TO BAR SOCIAL SECURITY BENEFIT PAYMENTS TO CRIMINALLY INSANE INDIVIDUALS CONFINED TO PUBLIC INSTITUTIONS BY COURT ORDER

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To Bar Security Benefits Payments t...

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THE

SUBCOMMITTEE ON SOCIAL SECURITY

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 979

TO AMEND TITLE II OF THE SOCIAL SECURITY ACT TO EXPAND CURRENT RESTRICTIONS ON PAYMENT OF BENEFITS TO PRISONERS TO INCLUDE PAYMENTS OF INDIVIDUALS CONFINED TO PUBLIC INSTITUTIONS PURSUANT TO COURT ORDER BASED ON A VERDICT THAT THE INDIVIDUAL IS NOT GUILTY OF A CRIMINAL OFFENSE BY REASON OF INSANITY OR A SIMILAR FINDING

SEPTEMBER 21, 1993

Serial 103–41

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TO BAR SOCIAL SECURITY BENEFIT PAYMENTS TO CRIMINALLY INSANE INDIVIDUALS CONFINED TO PUBLIC INSTITUTIONS BY COURT ORDER

TUESDAY, SEPTEMBER 21, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SOCIAL SECURITY,
Washington, D.C.

The subcommittee met, pursuant to call, at 1:40 p.m., in room B–318, Rayburn House Office Building, Hon. Andy Jacobs, Jr. (chairman of the subcommittee) presiding.

[The press release announcing the hearing and the text of H.R. 979 follow:]

FOR IMMEDIATE RELEASE
TUESDAY, JULY 20, 1993

PRESS RELEASE #4
SUBCOMMITTEE ON SOCIAL SECURITY
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-1721

**THE HONORABLE ANDY JACOBS, JR. (D., IND.), CHAIRMAN,
SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS,
U.S. HOUSE OF REPRESENTATIVES,
ANNOUNCES A HEARING ON H.R. 979,
TO BAR SOCIAL SECURITY BENEFIT PAYMENTS
TO CRIMINALLY INSANE INDIVIDUALS
CONFINED TO PUBLIC INSTITUTIONS BY COURT ORDER**

The Honorable Andy Jacobs, Jr. (D., Ind.), Chairman, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, today announced that the Subcommittee will hold a hearing on H.R. 979, which would expand current restrictions on Social Security benefits to prisoners to include individuals confined to public institutions by court order based on a verdict of not guilty by reason of insanity. In announcing the hearing, Chairman Jacobs stated, "Disability benefits are paid in lieu of wages to provide shelter and food, which these patients are already receiving at the expense of the State. It's a double dip." The hearing will be held in September. The specific date will be announced in a subsequent press release.

BACKGROUND:

Present law bars the payment of Social Security benefits to individuals confined to prisons or other correctional facilities as a result of a felony conviction. (Qualified family members of such individuals may continue to receive benefits.) An exception is provided for imprisoned felons who are satisfactorily participating in a court-approved program of rehabilitation which the Secretary of Health and Human Services (HHS) has determined is likely to result in the individual's return to work upon release from prison.

Current law does not, however, bar benefit payments to individuals confined to a public institution because they are found not guilty of a felony by reason of insanity. In some cases, such individuals have qualified for Social Security disability benefits based on evidence of insanity developed during a felony trial and have received payments while confined to a mental institution at public expense.

FOCUS OF THE HEARING:

The Subcommittee invites witnesses to comment on H.R. 979, which would expand the current restriction on payment of Social Security benefits to prisoners to include individuals who are confined to public institutions pursuant to a court order based on a verdict of not guilty by reason of insanity (or by reason of a similar finding, such as mental disease, mental defect, or mental incompetence). To enforce this restriction, the Secretary of HHS would be authorized to require from public institutions the names and Social Security numbers of inmates confined there under the conditions described above. The restriction would apply to benefits for months commencing 90 days after the date of enactment.

DETAILS FOR SUBMISSION OF REQUESTS TO BE HEARD:

Requests to be heard at the hearing must be made by telephone to Harriett Lawler, Dianne Kirkland or Karen Ponzurick [(202) 225-1721]. The telephone request should be followed by a formal written request addressed to Janice Mays, Chief Counsel and Staff Director, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. The Subcommittee staff will notify by telephone those scheduled to appear as soon as possible after the filing deadline, which will be announced in a subsequent release. Any questions should be directed to the Subcommittee staff [(202) 225-9263].

In view of the limited time available to hear witnesses, the Subcommittee may not be able to accommodate all requests to be heard. Those persons and organizations not scheduled for an oral appearance are encouraged to submit written statements for the record of the hearing. All persons requesting to be heard, whether they are scheduled for oral testimony or not, will be notified as soon as possible after the following deadline.

Witnesses scheduled to present oral testimony are required to summarize briefly their written statements in no more than five minutes. THE FIVE MINUTE RULE WILL BE STRICTLY ENFORCED. Subcommittee Chairman Jacobs advises witnesses that they will be allowed no more than two "finally's" and one "in conclusion." The Congressional Budget Office and similar U.S. Government agencies may be granted an exception. The full written statement of each witness will be included in the printed record.

In order to assure the most productive use of the limited amount of time available to question witnesses, those scheduled to appear before the Subcommittee are required to submit 150 copies of their statements to the Subcommittee on Social Security office, room B-316 Rayburn House Office Building, at least 48 hours in advance of their scheduled appearances. Failure to do so may result in the witness being denied the opportunity to testify in person.

WRITTEN STATEMENTS IN LIEU OF PERSONAL APPEARANCE:

Any persons or organizations wishing to submit a written statement for the printed record of the hearing should submit at least six (6) copies of their statement no later than the close of business, two weeks after the date of the hearing, to Janice Mays, Chief Counsel and Staff Director, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing a written statement wish to have their statements distributed to the press and interested public at the hearing, they may deliver 100 additional copies for this purpose to the Subcommittee, room B-316 Rayburn House Office Building, on the day of the hearing.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. Statements must contain the name and capacity in which the witness will appear or, for written comments, the name and capacity of the person submitting the statement, as well as any clients or persons, or any organization for whom the witness appears or for whom the statement is submitted.

4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

FOR IMMEDIATE RELEASE
MONDAY, AUGUST 9, 1993

PRESS RELEASE #5
SUBCOMMITTEE ON SOCIAL SECURITY
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-9263

THE HONORABLE ANDY JACOBS, JR. (D., IND.), CHAIRMAN, SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, ANNOUNCES THE DATE OF THE HEARING ON H.R. 979, TO BAR SOCIAL SECURITY BENEFIT PAYMENTS TO CRIMINALLY INSANE INDIVIDUALS CONFINED TO PUBLIC INSTITUTIONS BY COURT ORDER

The Honorable Andy Jacobs, Jr. (D., Ind.), Chairman, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, today announced the date for the Subcommittee's hearing on H.R. 979, which would expand current restrictions on Social Security benefits to prisoners to include individuals confined to public institutions by court order based on a verdict of not guilty by reason of insanity. The hearing will be held on Tuesday, September 21, 1993, in room B-318 Rayburn House Office Building, beginning at 1:30 p.m.

This hearing was announced, and background information was provided, in press release #4, dated July 20, 1993. As noted in that press release requests to be heard at the hearing must be made by telephone by close of business on Monday, August 23, 1993.

Those scheduled to appear before the Subcommittee are required to submit 150 copies of their statements to the Subcommittee on Social Security office, room B-316 Rayburn House Office Building, by close of business on Friday, September 17, 1993.

WRITTEN STATEMENTS IN LIEU OF PERSONAL APPEARANCE:

Persons submitting written statements for the printed record of the hearing should submit at least six (6) copies of their statement by the close of business, Tuesday, October 5, 1993, to Janice Mays, Chief Counsel and Staff Director, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements for the record of the printed hearing wish to have their statements distributed to the press and the interested public, they may deliver 100 additional copies for this purpose to the Subcommittee office, room B-316 Rayburn House Office Building, before the hearing begins.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages.

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4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

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103D CONGRESS
1ST SESSION

H. R. 979

To amend title II of the Social Security Act to expand current restrictions on payment of benefits to prisoners to include payments to individuals confined to public institutions pursuant to court order based on a verdict that the individual is not guilty of a criminal offense by reason of insanity or a similar finding.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 18, 1993

Mr. JACOBS introduced the following bill; which was referred to the Committee on Ways and Means

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A BILL

To amend title II of the Social Security Act to expand current restrictions on payment of benefits to prisoners to include payments to individuals confined to public institutions pursuant to court order based on a verdict that the individual is not guilty of a criminal offense by reason of insanity or a similar finding.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. RESTRICTION ON PAYMENT OF BENEFITS TO INDIVIDUALS CONFINED BY COURT ORDER TO PUBLIC INSTITUTIONS PURSUANT TO VERDICTS OF NOT GUILTY BY REASON OF INSANITY OR OTHER MENTAL DISORDER.

Section 202(x) of the Social Security Act (42 U.S.C. 402(x)) is amended—

(1) in the heading, by inserting "and Certain Other Inmates of Public Institutions" after "Prisoners";

(2) in paragraph (1), by inserting "or is confined in any public institution by a court order pursuant to a verdict that the individual is not guilty of such an offense by reason of insanity (or by reason of a similar finding, such as a mental disease, a mental defect, or mental incompetence)," after "applicable law,"; and

(3) in paragraph (3), by striking "any individual" and all that follows and inserting "any individual confined as described in paragraph (1) if the jail, prison, penal institution, correctional facility, or other public institution to which such individual is so confined is under the jurisdiction of such agency and the Secretary requires such information to carry out the provisions of this section.".

SEC. 2. EFFECTIVE DATE.

The amendments made by section 1 shall apply with respect to benefits for months commencing after 90 days after the date of the enactment of this Act.

Chairman JACOBS. Let the record show that Mr. Pickle has rapped the gavel and I am sure that means the hearing has begun. Where is our witness list?

Ms. Susan Donnelly is our first witness. Ms. Donnelly is from Annapolis, Maryland. Would you come forward, please?

Mr. BUNNING. Mr. Chairman, I would like to just enter my opening statement into the record, if you would have no objection.

Chairman JACOBS. Without objection, that is so ordered.

[The opening statement of Mr. Bunning follows:]

OPENING STATEMENT OF HON. JIM BUNNING

Mr. Chairman, Andy, I understand that you were a pioneer in the area of suspending benefits to prisoners convicted of a felony. You were the first to introduce such legislation on April 9, 1979, back in the 96th Congress. Benefits were suspended for disabled felons in 1980, and then for all felons in the 1983 amendments.

Today we will hear testimony on your bill to expand that provision to the criminally insane who are confined to public institutions by court order. The proposal definitely has merit. Since the inmates' needs for food, clothing, and shelter are met by the State, the benefits aren't needed for their primary purpose. Instead, such benefits have the unintended result of enriching the criminally insane beneficiary.

I understand that the provision may be difficult to administer, since the Social Security Administration may not be able to identify these beneficiaries readily. Hopefully, this and other potential problems with H.R. 979 will be addressed in today's hearing.

On the face of it, H.R. 979 seems like a reasonable cost-saving provision.

Chairman JACOBS. Please sit down, Ms. Donnelly. I apologize, too. It is my responsibility for being tardy. We usually try to start these exactly on time. You proceed in your own manner. We will be happy to hear from you.

STATEMENT OF G. SUSAN DONNELLY, ANNAPOLIS, MD.

Ms. DONNELLY. Thank you.

Mr. Chairman, ladies and gentlemen, my name is Susan Donnelly. Two years ago——

Mr. BUNNING. If you could pull the mike closer.

Chairman JACOBS. We are not trying to bug you. Just take it easy.

Ms. DONNELLY. My name is Susan Donnelly. Two years ago my life, as I knew it, was maliciously destroyed. I was managing a professional fire and water damage restoration company. An employee who had worked for us for about 2½ years, attacked me with a baseball bat, following a disagreement about the day's work schedule and severely damaged my head.

My jaw was broken in three places. The right side of my face was so shattered into too many pieces to allow use of the bones for reconstruction. Thirty-two stitches were required to sew up the back of my head. Several teeth were pushed up into my head. There is a large amount of nerve damage to the right side of my face. I suffered damage to my hearing and I now must wear hearing aids in both my ears and that is just some of what happened to me.

Returning to work has been very difficult. Following my attack, my self esteem is and—was and is still very low. My self confidence as well as my body took a beating. It makes me constantly question whether or not that I was doing the job as well as I thought I was, even though I knew I did an excellent job. If someone questions me at work I now mentally wince, and I have a lot of trouble dealing

with that because that is sort of how the attack became so in the first place. So giving out directions to my employees is a little bit difficult now. I second guess myself every single day, even though a part of me knows that I know my job inside and out. I have been there 7 years.

For a year and a half, I received Workmen's Compensation, but that didn't come close to equaling what my salary was at that time or allow me to pay all of my bills. I lost my position as a manager and it is doubtful that I will ever get it back. My boss has already told me that, so future earnings are now not going to be back to where they were before.

I also have mental and emotional problems. My authority and long term memory are faulty. I have lost a lot of my former vocabulary and English usage. My father helped me with this paper. I used to be an excellent writer. I received a civic award for an essay on a patriotic theme. I used to read a lot in my spare time but my attention span is so short now that I find it very difficult to read for any length of time.

I have a great deal of difficulty with the thinking process, like resolving schedule conflicts and figuring out how to go from point A to point B. I frequently lose control over my emotions for no apparent reason. I get into a rage over nothing and get upset as easily.

The State of Maryland found my attacker guilty of attempted murder and other charges, but he was found not criminally responsible. He was sent to Maryland's Clifton T. Perkins State Hospital. I am back at work now so my State tax dollars pay his medical treatment and his room and board. Now I discover that my Federal tax dollars rewards him with Social Security disability after he tried to kill me. I am a victim and in addition to my physical and emotional problems, I must cope with the reduced income while he does not pay any bills and can bank the Social Security payments.

This in my opinion is outrageous. I work hard, I pay my taxes and basically try to live a decent life. Where is the justice in what happened to me? Who is going to compensate me for what has happened in my life? Workmen's compensation paid an enormous amount of—Workmen's compensation paid enormous medical bills and eventually they will settle on a few hundred dollars compensation. This will not begin to compensate the impact this attack had and will continue to have on my life. I am trying the best I can to get on with my life and then this Social Security fiasco slaps me in the face.

I would urge you to pass this bill, H.R. 979. Please don't tell anybody that crime really does pay. Thank you.

Chairman JACOBS. Thank you, Ms. Donnelly. Would you wait just a moment, please, ma'am.

[The prepared statement follows:]

September 21, 1993

Mr. Chairman, Ladies and Gentlemen,

My name is Susan Donnelly. Two years ago my life, as I knew it, was maliciously destroyed. I was managing a professional fire and water damage restoration company. An employee who had worked for the company for about 2 1/2 years, attacked me with a baseball bat following a disagreement about the day's work schedule and severely damaged my head.

My jaw was broken in 3 places. The right side of my face was shattered into too many pieces to allow use of the bones for reconstruction. A bone fragment was driven up into my eye socket. My right elbow was broken. Thirty two stitches were required to sew up the back of my head. Several teeth were pushed up into my head. There is a large amount of nerve damage to the right side of my face. I suffered damage to my hearing and must now wear hearing aids in both ears. That is some of what happened to me.

Returning to work has been very difficult for me. Following the attack, my self esteem was and still is very low. My self confidence, as well as, my body took a beating. It makes me constantly question whether or not I was doing my job as well as I thought, even though I know I was doing an excellent job. If someone questions me at work I mentally wince and have trouble dealing with it. So now giving out directions on the job is not easy. Second guessing myself is an everyday thing, even though a part of me knows I know my job inside and out.

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The State of Maryland found my attacker guilty of attempted murder and other charges but not criminally responsible. He was sent to Maryland's Clifton T Perkins State Hospital. I'm back at work so my State tax dollars pay for his medical treatment and his board and room. Now I discover that my federal tax dollars reward him with Social Security disability payments after he tried to kill me. I'm the victim and in addition to my physical and emotional problems must cope with reduced income while he has no regular bills to pay and can bank the Social Security payments. That is outrageous!! I work hard, pay my taxes, vote and basically try to live a decent life. Where is the justice in what has happened to me. Who is going to give me money to compensate for what has happened to me. Workman's Compensation paid my enormous medical bills and may eventually give me a few hundred dollars. This will not begin to compensate for the impact this attack had, and will continue to have, on my life. I'm trying my best to get on with my life and then this Social Security fiasco slaps me in the face.

I urge you to pass this bill, H. R. 979. Don't tell everyone that CRIME REALLY DOES PAY!!

Thank You,

G. Susan Donnelly

Chairman JACOBS. Mr. Bunning, any comments or Mr. Pickle?

Mr. PICKLE. No, I have no questions.

Chairman JACOBS. Amo.

Mr. HOUGHTON. No, thank you very much.

Chairman JACOBS. I can't speak for the rest of the committee, but I am the author of the bill to change that situation. And I realize from your testimony it is more insult than injury, although partly injury, as you say you pay your Social Security taxes.

More than a decade ago we did—the law was changed so that prisoners could not receive disability benefits. I don't think any of us really thought at the time about those who were in mental institutions as a consequence of felony use or brutal conduct. That is why the bill was introduced; and I, for one, intend to do what I can to get it passed.

Ms. DONNELLY. I appreciate that. Thank you.

Chairman JACOBS. Yes, ma'am, good luck.

Ms. DONNELLY. Thanks.

Chairman JACOBS. We have a panel now. R.B. Nicholson, Winston-Salem, N.C.; Thomas J. Keith, district attorney, 21st Prosecutorial District, State of North Carolina; and accompanied by Vincent Rabil. I am sure you have heard your share of jokes so I will skip those, assistant district attorney.

Mr. Nicholson.

STATEMENT OF R.B. NICHOLSON, WINSTON-SALEM, N.C.

Mr. NICHOLSON. Thank you, sir. I am kind of accustomed to letting Tom go first.

I want to thank our representative, Steve Neal. He was the one that took note of our plea and brought it to your attention and, of course, we certainly appreciate what you are trying to do in this matter because we believe it is the right thing to do.

Our scenario was initiated in July 1988, when the subject, Hayes, assaulted 24 people with a deadly weapon. He succeeded in wounding nine, four of them fatally. One of the four killed was our youngest son, Thomas, who was 24 years old at that time.

If you recall the trial of John Hinckley in 1983, the Hayes trial was similar in several respects but just on a smaller scale. The greatest similarity was the public rejection of the jury decision, and of course we know that Congress completely rewrote the Federal insanity laws as a result of the Hinckley trial.

I wanted to mention my friend Tom Keith. I didn't put Vince in here because I didn't know he was coming. But they were not in office at the time of Hayes' prosecution, so they are not to be blamed for the outcome. I am confident if they had been in office at the time and been the prosecutor, he would be on death row now, not the mental hospital.

After the criminal proceedings, as executor of Tom's estate, I filed a wrongful death civil action against Hayes. In October 1990 in the court hearing Tom's estate, he was awarded a $2 million judgment. In his decision, the judge found that Hayes was responsible for his conduct and civilly responsible for, in the judge's word, his despicable acts. Later in 1990, and then in 1991, we were acting to execute on the civil judgment and through the hospital documents that we had obtained by court order, I found Hayes was re-

ceiving at that time $511 a month in Social Security disability benefits.

The media became aware of my discovery and advertised the perceived inequity all across North Carolina. The public was understandably upset on hearing the news. I had many phone calls from people who had paid into the system for up to 40 years and were receiving less than Hayes, and it was at that time that Mr. Keith and I contacted Representative Neal.

We learned that Hayes was spending his benefit check on creature comforts, was one term that was used. At that time he was allowed to go off campus with a hospital technician escort on what frequently were day long shopping sprees. Then in November 1991, he disappeared from the hospital grounds for about 8 hours. Unfortunately, the hospital does not have very good security.

As a result of the public notice of what the media termed "Hayes' escape," his privileges have since been severely restricted.

In July of 1992, the hospital's inventory of his personal property filled nine sheets and there was 20 items on each sheet. The administration had been forced to provide him with additional storage area for the overflow. The most noted entries on the inventory were 40 summer shirts. We could imagine knit regular collared shirts. It also listed nine pair of dress pants, four jackets, two full length leather coats and on and on, and all of it was purchased with the Social Security money.

His living area was furnished much better than any college student's dorm room. He had two television sets, two VCRs, a very elaborate stereo system, large collection of audio and videotapes, and a microwave oven, which he liked to order in pizza every night and warm it up in his microwave oven. For a time he had a pair of hand held radio transmitter receivers, walkie talkies. He had a girlfriend in the hospital and he and his girlfriend communicated that way.

A news story at that time wrongly reported that a portion of his monthly endowment was going to the hospital to help pay for his care, but we have determined that the hospital has never collected any part of it. In executing on the civil judgment, I have found, and I am sure you know, it is impossible to intercept or garnish a Social Security payment. By Federal law, the check must be delivered to the recipient.

The social worker who handles Hayes' case testified in the last release hearing she has asked him numerous times to voluntary contribute to his care but he has refused each time. After patients are discharged from the North Carolina mental health services, the administration does make an effort to collect from them, but according to their public relations person, they have never been able to collect any of the money.

The declared purpose of the Social Security payment to provide for the recipient's care is commendable, but like so many other well intended programs, it is being shamefully abused, and I know that in North Carolina none of the money is being used as it was intended.

So we would strongly support what you are doing.

Chairman JACOBS. Thank you very much, Mr. Nicholson.

[The prepared statement follows:]

His living area was furnished much better than any college student's dorm room. He had two television sets, two VCR's, an elaborate stereo system, a large collection of audio and video tapes and a microwave oven, which he used to warm the pizzas he ordered in almost nightly. For a time, he had a pair of hand-held radio transmitter-receivers, walkie-talkies, with which he and his girl-friend, who was a fellow patient, communicated during the day.

A news story, at that time, reported wrongly that a portion of Hayes's monthly endowment was going to the hospital to help pay for his care. I have since determined, from several different sources, that this is untrue.

In executing on the civil judgement, I found, what I am sure that you know, that it is impossible to intercept, or garnishee, the Social Security payments. By federal law, the check must be delivered directly to the recipient. The social worker, who handles Hayes case, testified in a court hearing, that she has asked him numerous times to voluntarily contribute to his care. He has adamantly refused each time.

After patients are discharged from the hospital the administration does make an effort to collect from them, but according to a statement by their public relations person, they have never collected from any of them.

The declared purpose of the Social Security payment - to provide for the recipient's care - is commendable, but, like so many other well-intended programs, it is being shamefully abused. I know that in North Carolina the money is not being used as it was intended.

Chairman JACOBS. Mr. Keith, I am a little bit puzzled. I have a note here that somebody will only answer questions. Do you have a statement, sir?

Mr. KEITH. Whatever the Chairman wants me to do or say.

Chairman JACOBS. Any comment you would care to make would be most welcome. I am not sure, I think it is Mr. Rabil who would respond to questions. Good.

Mr. KEITH. I brought my lawyer with me so I wouldn't get in trouble.

Chairman JACOBS. There you go. My father sometimes refers to the blind leading the nearsighted. I hope that is not your problem here.

STATEMENT OF THOMAS J. KEITH, DISTRICT ATTORNEY, 21ST PROSECUTORIAL DISTRICT, STATE OF NORTH CAROLINA, ACCOMPANIED BY VINCENT RABIL, ASSISTANT DISTRICT ATTORNEY

Mr. KEITH. Without going over the things that he has, my concern was in preparing for the annual hearing, which we have every February, whether he will be recommitted.

In getting prepared for the first hearing, which was in 1992, in February we went to Raleigh, my assistant in fact spent about 7,000 miles going back and forth to Raleigh getting prepared, et cetera, et cetera. We found out that Mr. Hayes was well taken care of by the State of North Carolina.

Dorothea Dix Hospital is a beautiful campus, somewhat akin to a smaller Chapel Hill, where I graduated. It is open. It is not chains and guards, what have you, with supervision he may move around, he may go to classes, basketball, et cetera. I would suppose they provide food, clothing, housing, et cetera. His total needs.

Like Mr. Nicholson, I was amazed to find out he also got Social Security, and if he took that money and paid the victims of his crime, or if he paid his child support, or if he donated it to charity, that would not bother me as much as the fact that he has accumulated all these personal property items. And what disturbed me most was the phone call I got from someone in Wake County, in Raleigh, and followed up on an interview with several witnesses, one of whom had sold Mr. Hayes, who had killed four people and wounded five and tried to shoot a total of 24 people, had brought to Dorothea Dix Hospital a motorcycle. Delivered it on the hospital where Mr. Hayes paid $800 cash money. I reckon that was your money and my money from Social Security, and that bothered me.

Again, it is not a secure campus. He could rev the thing up and he could drive away. His wife, who probably, prior to that time, he had not married, was a girlfriend, also a mental patient, multiple personalities, somewhere just prior to this incident, has shown up on campus with a .44 magnum pistol. We don't have a lot of guerrillas in Wake County that that type of gun would be needed for home protection. They took the pistol away from her and sent her home, et cetera, et cetera.

He, therefore, has the capability to buy a weapon for escape and a vehicle for escape and to come to Wake County or Winston-Salem in Forsyth County, an hour and a half away by the interstate, and carry forward on some of his veiled threats against Mr. Nicholson

to confirm this. I was thereafter advised that it was legal for persons found not guilty by reason of insanity confined to a state mental hospital to receive such social security benefits.

I thought this was wrong and asked Representative Neal's staff to see what could be done about this. Mr. R.B. Nicholson, the father of one of Hayes' victims, has followed up on this matter since then. I am now heartened to see that this sub-committee is now going to this problem.

From our investigation during the preparation for these annual hearings, it is apparent that the State of North Carolina provides all the needs of Mr. Hayes and all other patients confined at Dorothea Dix Hospital. The hospital is a beautiful facility in a college like setting with large trees, lawns and gardens. The State provides all inmates with food, free medical services and either a single room or double room depending on what level of treatment they are receiving. Additionally, Mr. Hayes' family is financially well off. His mother and step-father are able to provide for any incidental needs of Mr. Hayes.

Mr. Hayes has also been able to work at the hospital store and earns money for his efiorts.

In the testimony, some of the medical staff testified that they would take Mr. Hayes shopping in downtown Raleigh and on occasions and he would purchase leather coats and had a room full of electronic stereo and television equipment which he had purchased while he was at the hospital.

I assume that these purchases were made with the social security payments he receives as a patient.

With the multi-trillion dollar deficit, and in face of the State of North Carolina's ability to provide such patients with all the necessities of life, any social security payment to these patients should be stopped.

I can not see why any similarly situated patient needs to be allowed to "double-dip" during long hospital stays. The law needs to be changed to plug this "loop hole."

I hope the sub-committee will favorably report to the full committee the need to adopt a law stopping social security payments to committed criminally insane patients.

Very truly yours,

Thomas J. Keith
District Attorney
Twenty-first Prosecutorial District
State of North Carolina

Chairman JACOBS. I was smiling because my wife and I live next door to a horse farm. She accused the owner of putting out a present on Christmas Day for the horses, and they were a very steamy and molassey feed. He claimed it was just what he had to do. We said bah humbug, but I think he loved his horses.

Mr. Bunning.

Mr. BUNNING. No questions.

Chairman JACOBS. Mr. Pickle.

Mr. PICKLE. Under your bill, Mr. Chairman, would the benefits of the person who had been declared criminally insane that he would normally receive in prison, would those benefits still be made available to his dependents, his spouse? Does your bill provide for any change in that procedure?

As I recall it, when we passed the bill in 1980, we said the criminal person, indicted, convicted, would—

Chairman JACOBS. I would answer the gentleman's question. I believe that is the intent of the bill. The inmate does not profit personally, but he or she may have become mentally ill after a working period, so on and so forth, and the dependents have a standing.

In other words, you are asking me whether the bill declares a new American principle of corruption of blood, and I believe it does not.

Mr. PICKLE. Well, then, the spouse or dependent would still be entitled to the benefits?

Chairman JACOBS. Yes.

Mr. PICKLE. Thank you.

Chairman JACOBS. Jake, there is a passage in the novel Oliver Twist where a Mr. Bumble is hailed before a court and he is charged with a crime his wife is alleged to have committed and he says why me? And the court says because the law presumes that you control the acts of your wife.

Mr. PICKLE. Acts.

Chairman JACOBS. And Mr. Bumble replied, then, me Lord, if the law supposes that, the law is an ass, a fool and a bachelor.

We thank you, all of you, for your contribution to the record. I hope we can—I didn't write it.

Mr. RABIL. Mr. Chairman, we brought a copy of the last order committing Mr. Hayes to the hospital with the findings of his present condition. We would ask that be made a part of the record. We have handed a copy to the staff member.

Chairman JACOBS. Thank you, it will be. Thank you kindly.

[The information follows:]

an Axis I (DSM-IIIR) mental illness and that this mental illness continues to exist even though the psychotic phase is presently in remission; that this mental illness has not been cured; and that the psychotic phase of this illness has a reasonable probability of recurrence in the future.

No. 4. That Michael Hayes also presently suffers from or suffers with multiple Axis II (DSM-IIIR) mental illnesses including mixed substance abuse disorders in remission, antisocial personality disorder, narcissistic personality disorder; that his Axis II mental illnesses can also be classified as a mixed personality disorder with paranoid, narcissistic, antisocial, and sadistic features; and that these multiple Axis II mental illnesses are currently being treated and have not been cured and that they are likely to continue in the future.

No. 5. That these Axis I and Axis II mental conditions together and separately so lessen the capacity of Michael Hayes to use self control, judgement and discretion in the conduct of his affairs and in his social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance or control and, thus, they constitute mental illnesses as defined by G.S. 122C-3(21).

No. 6. That psychology and psychiatry are inexact medical and scientific disciplines which do not provide the Court with an accurate method or mechanism by which to predict the likelihood of future psychotic episodes; the more treatment which Michael Hayes receives for his mental illnesses, the more likely such treatment will reduce and diminish the probability of future

violence and dangerousness to others; that the best predictor of future behavior is past behavior, especially when such behavior was in the recent or relevant past; that the extremely violent behavior exhibited on July 17th, 1988, by Michael Hayes was conduct within the relevant and recent past which provides the Court with very important information in assessing Mr. Hayes' probable likelihood for futre violent behavior and for present and future dangerousness to others.

No. 7. The Court finds by clear, cognet, and convincing evidence that the four homicides and five felonious assaults committed by Michael Hayes on July 17th, 1988, are episodes of dangerousness to others in the recent and relevant past which in combination with his past and present mental condition, his multiple mental illnesses, and his conduct since July 17, 1988 lead the Court to find that there is a reasonable probability that Michael Hayes' seriously violent conduct will be repeated and that he will be dangerous to others in the future. The Court finds that Michael Hayes is at far greater risk for future serious violence than the average person and that he is at a much greater risk for future violence than the average person as well as the average person who has a mental illness.

No. 8. The Court specifically finds by clear, cogent, and convincing evidence that Michael Hayes is presently dangerous to others as defined by G.S. 122C-3(11)b and that he suffers from multiple mental illnesses as previously described by the Court and that confinement is necessary to ensure the safety of others and that confinement is necessary to alleviate or cure his mental illnesses.

Chairman JACOBS. Our colleague, Mr. Franks, is scheduled.

Mr. BUNNING. May I inquire about your explanation on the bill? The benefits to the spouse and to the dependents would continue to flow but the SSDI benefit to the recipient, the criminally insane, the felon, would not?

Chairman JACOBS. Yes.

Mr. BUNNING. I wanted to make sure we clarified that.

Chairman JACOBS. Mr. Franks, thank you for your willingness to testify. Please proceed in your own manner.

STATEMENT OF HON. BOB FRANKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. FRANKS. Mr. Chairman, thank you very much for providing this the opportunity.

Chairman JACOBS. Oh, Bob, would you hold on just 1 second.

I guess there is a second member of the panel who should be, if you don't mind, seated next to you, Mr. Bissell, who is prosecutor, for the county of Somerset, Somerville, N.J. Is that you?

Mr. BISSELL. Yes, sir.

Chairman JACOBS. Your name is over here and you are over here.

Mr. FRANKS. We are new here, Mr. Chairman.

Chairman JACOBS. Yes, sir.

Mr. FRANKS. Mr. Chairman, having had the opportunity to listen both to Ms. Donnelly and Mr. Nicholson, I believe that the compelling case that both of them made and the horrible injustices and trauma that they have suffered underscore the need for your bill, and I commend you for hearing this matter and taking this time to educate the public as to what I perceive to be the misuse of public funds.

My story, Mr. Chairman, relates to this issue and I guess it builds on it in one sense, and that is that these payments to an individual in my district over an incident back on January 5, 1993. On that date, 27-year-old Herbert Olsson, escaped the Marlboro State Psychiatric Hospital, where he had been sentenced after attempting to kill his parents by repeatedly stabbing them with a knife. He had been sentenced to Marlboro State Psychiatric because he, in fact, had been found not guilty by reason of insanity.

He was able to escape Marlboro State Hospital and what assisted him substantially in his ability to elude law enforcement authorities for a week, because of over $7,000 in Social Security checks that he took out of the hospital with him. With that money, he rented a hotel room in New York City, something that many of my constituents probably would like to do for a weekend but simply cannot afford it. Mr. Olsson, the recipient of our largess, utilized Social Security moneys to rent a hotel room and elude authorities.

So I guess it goes to further the case that whether or not these people should unjustly enrich themselves with creature comforts, as Mr. Nicholson indicated, these funds can actually be used to assist in an escape, and it outraged my constituents, many of whom are Social Security recipients and law-abiding citizens.

It just seems to me to break the social contract that we created when we formed Social Security. The needs of these individuals who have committed these heinous acts, their needs for food for

shelter and for clothing are taken care of by the government. They don't need this money in this setting. It is unconscionable, in my judgment, that they continue to receive these moneys, which is why I wanted to come forward and relate to you, Mr. Chairman, my story, and underscore the need for your bill.

I have substantially similar legislation, H.R. 2161. I was motivated merely by having heard about the incident in my district. I am delighted that Nick Bissell, who is our Somerset County prosecutor, who is very familiar with this issue, has traveled to Washington today to provide some insights to the committee.

[The prepared statement follows:]

Chairman JACOBS. Mr. Bissell.

STATEMENT OF NICHOLAS L. BISSELL, JR., PROSECUTOR, COUNTY OF SOMERSET, SOMERVILLE, N.J.

Mr. BISSELL. Thank you, Mr. Chairman and members of the committee.

I appear today to testify in support of H.R. 979, which I understand will expand the restriction on the payment of Social Security payments to prisoners under current law to include individuals who are confined as the result of a verdict of not guilty by reason of insanity.

I believe that the subject legislation is both timely and necessary. I would like to give the committee the benefits of the history of a Somerset County case, which is evidence of the need for this legislation.

In March of 1991, Herbert Olsson attempted to murder both of his parents by inflicting upon them multiple stab wounds. The investigation revealed that Mr. Olsson had certain fantasies and idolizations about another young man in Somerset County who had murdered both his parents. The investigation and the subsequent medical examinations of Mr. Olsson, revealed that he had a history of schizophrenia and polysubstance abuse and while attempting to murder his parents he was delusional.

In December of 1991, after extensive medical evaluations, a superior court judge in Somerset County found Mr. Olsson not guilty by reason of insanity. In accordance with New Jersey law, Mr. Olsson was transferred to the Marlboro State Hospital for confinement and treatment. In June 1992, Mr. Olsson received a Social Security disability check in the amount of $8,646, representing retroactive payments, together with monthly payments of $678.

According to hospital records, Mr. Olsson's treatment was progressing well and he had obtained ground privileges which allowed him to move freely on the hospital grounds.

On January 5, 1993, Mr. Olsson left the grounds of the hospital without approval. A subsequent investigation which was conducted by the Somerset County Prosecutor's Office, Monmouth County Prosecutor's Office and the Human Services Police Department, revealed Mr. Olsson was able to convince a former patient at the hospital, who was a friend, to pick him up and take him to New York City.

In New York City, Mr. Olsson was able to buy and use narcotics until his apprehension on January 10, 1993, by members of the Somerset County Prosecutor's Office and the New York City Police Department. The investigation revealed that the money that Mr. Olsson had received by way of Social Security benefits allowed him to entice the former patient and friend and another person to aid in his escape and transport him to New York City. These same funds enabled Mr. Olsson to purchase substantial quantities of narcotics for himself and his accomplices to be used during the 5 days of his escape.

It is our feeling without the availability of that money, Mr. Olsson would not have been successful in leaving the hospital or enticing others to assist him.

Mr. Olsson was apprehended without incident or injury to anyone else. However, his escape and the ensuing investigation and apprehension caused by his being at large came at a significant cost to the public. There was active involvement of two prosecutors' offices in attempting to locate Mr. Olsson, around the clock police protection assigned to his parents who were the victims of his crime, and there was a general alarm and fear throughout the neighborhood where his parents resided.

The proposed legislation would be extremely beneficial in eliminating or severely limiting the potential for people like Mr. Olsson to escape from mental institutions.

Generally, as patients such as Mr. Olsson proceed in their treatment in therapy, they are accorded certain privileges and freedoms which always present a risk for escape. However, without money, the possibility of these people being successful in an escape or in being able to remain at large for extended periods of time or being successful in obtaining narcotics or other contraband which could lead to their injuring innocent citizens is much reduced or eliminated.

In addition, individuals such as Mr. Olsson are in the custody and care of the State which has institutionalized them. Other than the fact that they are not serving fixed sentences and are to receive treatment as opposed to merely being incarcerated, they are really in no different a position than other convicted felons since their housing, food and other necessities are being provided by the State.

If the purpose of this disability benefit is to ensure people who cannot provide for themselves are not without food and shelter, there is no reason to provide such benefits to people such as Mr. Olsson whose daily necessities are being provided by the State.

Therefore, I would urge the subcommittee favorably to consider H.R. 979 since the legislation would address a serious problem confronting law enforcement authorities in these types of cases. Thank you.

Chairman JACOBS. Thank you, Mr. Bissell.

Mr. BUNNING. No questions.

Chairman JACOBS. I should say that the earlier legislation we passed more than a decade ago does speak of prison and a series of descriptions of penal discussions but it also has the term "and other correctional facilities," and there is enough ambiguity there. We think it has to be cleared up, and it is just one of those things where the failure of language, I guess, did not quite achieve the purpose that all of us had in mind at the time.

So, Mr. Franks, I think it is commendable that you thought of the problem on your own hook and offered the legislation, and if the legislation finds favor in the subcommittee and the full committee it would be my hope that we might be able to include it in anticipated legislation on Social Security regarding the so-called Nannygate problem. We will see.

Mr. FRANKS. Good news, Mr. Chairman.

Chairman JACOBS. Cross your fingers and pray they vote for your testimony. Very useful.

We will now hear from the Acting Commissioner of Social Security, Larry Thompson, and you are most welcome. You have been here many times but not in the cat bird seat, I believe. Mr. Thomp-

son, I apologize. I don't have a beverage and a meal for you, but you cannot just join the church and sing in the choir the first day.

Mr. THOMPSON. Thank you, Mr. Chairman.

Chairman JACOBS. That is inside, folks.

STATEMENT OF LAWRENCE H. THOMPSON, ACTING COMMISSIONER OF SOCIAL SECURITY

Mr. THOMPSON. I appreciate the opportunity to appear before you today to discuss this question of suspending the benefits for persons who are confined to public institutions after being found not guilty of a felony by reason of insanity.

I welcome the opportunity also to share our views on H.R. 979, to raise some issues of concern with the legislation, and to offer to work with you to perfect the bill to ensure, to the extent possible, your intent is fully achieved.

Mr. Chairman, I have a full written statement that discusses the issue at length and answers the questions that you posed in your letter of September 14. I would like to submit that for the record.

Chairman JACOBS. Without objection.

Mr. THOMPSON. Before I summarize SSA's implementation of the current law, which suspends benefits for prisoners incarcerated for a felony conviction, and discuss our concerns about H.R. 979, I would like to take a moment to say a word about the witnesses and the stories that have preceded me.

On behalf of the agency, I want to share with them our deep feelings for the pain they have suffered. No reasonable person could fail to understand their strong opinions on the issues we are discussing today. They deserve to be commended for coming here today and for seeking to build better public policy as a product of their own traumatic experiences.

In order to build better public policy, it would be helpful to first discuss SSA's enforcement of the statutes requiring the suspension of Social Security benefits to beneficiaries who are incarcerated as a result of felony convictions. Congress' intent in fashioning the benefit suspension laws in 1980 and 1983 is quite clear. Social Security benefits are intended to provide a source of income for persons who are retired, who cannot earn wages because of a disability, or who are entitled to survivor benefits.

Congress, when they passed the benefit suspension laws, believed that individuals who reside in prisons at public expense have no need for the financial benefits Social Security provides. There are approximately 15,000 beneficiaries who are in benefit suspension status because they are incarcerated felons. Many people consider H.R. 979 to be a logical extension of this law. If, after all, we are not paying benefits to persons who are confined to penal institutions after being convicted for felonies, why should we provide benefits to those who are confined to mental institutions after being found not guilty of a felony by reason of insanity?

I certainly share your concern about the payment of Social Security benefits to persons who commit serious crimes and are confined to mental institutions. However, H.R. 979 as drafted does raise some issues on which we would be glad to work with you to address. The bill in some cases would suspend benefits of people whom most Americans would believe should continue to receive

them. At the same time, it might allow benefits to be paid to others whom most Americans believe should not receive them.

For example, what may be a felony in one jurisdiction may be a misdemeanor or not classified as a crime in another jurisdiction. We don't believe Congress intends to suspend benefits for acts many people would regard simply as mentally ill rather than criminal. On the other hand, some criminal cases often involve unspeakable crimes and the accused is determined to be incompetent to stand trial because he or she is unable to understand the court proceedings involved. Usually these people are placed in a public institution and there is no trial. In such cases, H.R. 979 would not apply and Social Security benefits would not be suspended.

We also need to take into consideration the fact that some States have eliminated the not guilty by reason of insanity verdict and provided for an alternative finding. Maryland, for example, recognizes a finding of guilty but not criminally responsible, and at least 10 other States, including Indiana, provide for a guilty but mentally ill finding. In these States, defendants are being confined to mental institutions after receiving guilty verdicts. I believe most people would find these verdicts equivalent to a verdict of not guilty by reason of insanity.

We need to make sure H.R. 979 covers these cases because it specifies now that the benefits will be suspended upon a finding of not guilty by reason of insanity. Because of the differences in the way the verdicts are worded, the bill may not have the same effect—the effect that Congress intends in each State.

In conclusion, Mr. Chairman, this legislation does address legitimate concerns about paying Social Security benefits to persons who have committed crimes that have resulted in their confinement to mental institutions and we would like to work with you to ensure that the bill, to the extent possible, fulfills the congressional intent and does not produce any undesirable results.

I would be pleased to answer any questions.

Chairman JACOBS. Thank you, Mr. Thompson.

[The prepared statement and attachment follow:]

TESTIMONY OF HON. LAWRENCE H. THOMPSON, ACTING COMMISSIONER SOCIAL SECURITY ADMINISTRATION

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you today to discuss H.R. 979, the bill which you introduced to provide for the suspension of Social Security benefits in the case of persons found not guilty of a felony by reason of insanity and confined to public institutions. Many people consider this bill to be a logical extension of current law, which provides for the suspension of benefits of persons confined to penal institutions as a result of felony convictions.

Before I summarize our implementation of current law, which suspends benefits for prisoners incarcerated for felony convictions, and discuss our concerns about H.R. 979, I would like to take a moment to say a word about the witnesses who preceded me. Speaking on behalf of the Agency, I want to share with the victims (and their families) of crimes committed by those later found not guilty by reason of insanity, our sympathy for the pain they have suffered. No reasonable person could fail to understand their strong opinions on the issues we are discussing today. They deserve to be commended for coming here today and for seeking to build better public policy as a product of their own traumatic experiences.

Prisoner Suspensions

In 1980, the Social Security Act was amended to require the suspension of Social Security disability benefits for any month in which a beneficiary is incarcerated based on a felony conviction. The law contains an exception for beneficiaries participating in court-approved rehabilitation programs which meet specific statutory requirements.

In 1983, the prisoner suspension provisions were extended to Social Security retirement and survivor benefits based on similar considerations.

Legislative history clearly indicates that Congress believed that the unrestricted payment of retirement, survivor, and disability benefits to convicted prisoners--who are being maintained at public expense anyway--was inappropriate and did not serve the basic purpose of the Social Security program. The disability program is intended to provide a source of income for people whose earnings stop due to disability, not to individuals who are unable to work due to incarceration for a felony.

SSA Experience With Prisoner Suspensions

In your letter of September 14, 1993, you asked three specific questions about implementation of the current prisoner's provision. I will summarize that process now and have appended to this statement complete responses to your questions.

Approximately 15,000 beneficiaries have their benefits suspended because they are incarcerated felons. SSA relies primarily on reports from the States in order to administer the prisoner suspension provisions. Under agreements negotiated with the States, the States furnish us with the names and Social Security numbers of all prisoners, and indicate whether conviction was for a felony offense. Based on this information, we suspend benefits if appropriate. We also receive reports about prisoners from third party sources, which need to be verified before we take any action on them, and occasionally from prisoners themselves. We rely on self reporting to reinstate benefits for prisoners upon release from incarceration.

Suspension for Not Guilty by Reason of Insanity

As I have mentioned, I share your concern about the continuing payment of Social Security benefits to persons who commit serious crimes but are found not guilty by reason of insanity. However, I think we need to consider carefully certain difficult issues which the current bill raises. We would be glad to work with you to explore these issues and reach an acceptable resolution of them. Put simply, we need to be sure that the bill would not suspend the benefits of people who most would think ought to receive them, or that it would not allow benefits to be paid to people who most would think should not receive them.

It would be reasonable to argue that an individual who commits a brutal crime and who is sent to a State mental hospital after being found not guilty by reason of insanity should not receive benefits, especially in view of the prisoner suspension provision. However, the current bill might produce results in some not guilty by reason of insanity cases that many would consider to be somewhat arbitrary and capricious. For example, what may be a felony in one jurisdiction may be a misdemeanor in another, and in some jurisdictions may not be classified at all.

On the other hand, as drafted, the bill may not reach everyone that most Americans think it should reach. In some criminal cases, at times involving the most abhorrent and outrageous crimes, the person accused of criminal conduct is determined to be incompetent to stand trial because he or she is unable to understand the court proceedings. Typically, such persons are placed in a public institution. Since there is no trial, there is no finding of not guilty by reason of insanity. Thus, H.R. 979 would not apply, and Social Security benefits would not be suspended.

We understand that some State laws have eliminated the not guilty by reason of insanity defense and provide for an alternative finding. For example, Maryland recognizes a finding of "guilty but not criminally responsible" and at least ten other

States, including Indiana, provide for a "guilty, but mentally ill" finding. Because there was a finding of "guilty", the bill presumably would not result in suspension of benefits in such cases, despite the fact that many people would view this finding as equivalent to a not guilty by reason of insanity finding.

Administrative Impact

If H.R. 979 were enacted, we estimate that about 1,500 people would have their Social Security benefits suspended and that program savings would amount to about $10 million per year. These estimates must be considered very approximate due to the lack of available information about people found not guilty by reason of insanity.

To implement H.R. 979, we would make arrangements with the States, similar to the prisoner data reporting arrangements, to obtain reports of persons found not guilty by reason of insanity. The ease with which States can identify these cases will depend on how responsibilities are assigned in each State. For example, both the State court system and the State mental health system could be involved. I might mention that the negotiation process for the current agreements took about 3 years.

Conclusion

H.R. 979 would address legitimate concerns about paying Social Security benefits to persons who have committed heinous crimes. We need to consider carefully, however, whether the provisions of H.R. 979 can be modified to assure that the bill affects those people that most Americans would want to affect without, to the extent possible, affecting others. Mr. Chairman, we would be pleased to work with you to perfect the bill to avoid any undesirable results.

1. How does the Social Security Administration enforce the existing ban on benefit payments to incarcerated felons? Please describe the agency's enforcement mechanisms at the Federal, State, and local levels.

- We have negotiated agreements with the States under which they regularly provide us with the names, SSNs and dates of imprisonment of all prisoners, and whether conviction was for a felony. We also receive similar information on the basis of informal local arrangements with some Federal prisons. In some cases, prisoner data is reported by local jurisdictions, under agreements between us and the local jurisdictions.

- We also receive reports about prisoners from third parties. These reports are verified before we take any suspension action.

- We are working with the Federal Bureau of Prisons to set up an automated data-match system in order to get more complete and timely information on Federal prisoners.

2. For how many prisoners is SSA currently withholding benefit payments? Please provide separate estimates for Federal, State, and local prisoners. In general, how has the number of prisoners in benefit suspense status changed over time?

- Currently, about 15,000 beneficiaries have their benefits suspended because they are incarcerated felons.

- Our information on prisoner beneficiaries cannot be broken down into Federal, State, or local prisoner categories. We do not collect such data because it is not a necessary part of administering the law.

- We do not have data on the growth over time in the number of prisoners whose benefits are suspended.

3. How does SSA assess the effectiveness of its enforcement mechanisms? For what portion of the universe of ineligible prisoners does SSA estimate that it has succeeded in ceasing benefits?

- SSA assesses its effectiveness in enforcing the prisoner provisions in several ways:

  -- We continually monitor the effectiveness of reporting procedures through numerous contacts with Federal, State, and local reporting sources. We also provide assistance in improving reporting procedures.

  -- We periodically review data provided under the matching agreements with the States for indications of problems. We investigate inconsistent and incomplete data and offer guidance and assistance for preventing future problems.

  -- The Privacy Act, as amended, which provides specific requirements for matching agreements such as those between us and the States for enforcing the prisoner provision, mandates an annual cost/benefit analysis of effectiveness of the SSA-State agreements.

- We are confident that we have suspended the benefits of the vast majority of prisoner beneficiaries, but we are continuing to work to improve reporting procedures.

Chairman BUNNING. Mr. Bunning.

Mr. BUNNING. I appreciate the fact, Mr. Thompson, you are not the responsible party, but leaving the job of Commissioner vacant for a year certainly makes a great case for SSA as an independent agency. You ought to alert those in a position to act on this vacancy that the House shares the Senate's concern.

Now I will get into the question.

Mr. THOMPSON. I am pleased to say the President has nominated Dr. Shirley Chater and the President and Senator Moynihan are now working to schedule the hearings.

Mr. BUNNING. That is great.

I understand the general provisions prohibiting payment to certain felons have been on the books for about 10 years, yet you still do not have an agreement with the Federal Bureau of Prisons. Can you tell me why you don't?

Mr. THOMPSON. We have been working with the Bureau of Prisons. We do have an arrangement with each of the prison facilities, with our local district offices, to get information about Federal prisoners, so it is not as if we are not enforcing this provision with respect to the Federal prisons. But their record system is one in which they have had difficulty trying to fold things up so that they can supply us with a single record, monthly or quarterly, that would allow us to do this.

Mr. BUNNING. Single record telling you who has been convicted of a felony?

Mr. THOMPSON. Yes. The way we have worked this out with most of the States is that they provide us with a periodic tape of the names and Social Security numbers and status of their new prisoners and then we—

Mr. BUNNING. How hard would it be if it were done on a monthly or quarterly basis if you have agreements with these people?

Mr. THOMPSON. It is not hard for us.

Mr. BUNNING. It is obviously hard for the Bureau of Prisons to get you the information; is that what you are telling me?

Mr. THOMPSON. Yes, and I really am not able to give you a lot of details on what their problems are. We have been working with them. We have not gotten an agreement with them. We have worked on an alternative.

Mr. BUNNING. They are not complying with the law is that what you are telling me.

Mr. THOMPSON. It is not a question that they are not complying with the law. In fact, I am not sure how the law applies to them. The law gives us the authority to ask, and we have asked, and we are working with them to try to formalize an agreement.

Mr. BUNNING. I understand the benefits have been suspended for about 15,000 felons.

Mr. THOMPSON. Fifteen thousand is our estimate.

Mr. BUNNING. In 1982, GAO estimated the universe at about 1 percent of beneficiaries, or somewhat over 40,000 today. In other words, we have a discrepancy of about 25,000 people about whom the Bureau of Prisons has not notified you. Is that pretty factual?

Mr. THOMPSON. I would not know where the GAO estimate came from. I would not know on what that was based. Our best estimate is about 15,000.

Mr. BUNNING. This is a 1992 estimate of those who should be covered?

Mr. THOMPSON. That is our estimate of how many we are withholding benefits from. That would include Federal prisoners.

Mr. BUNNING. In other words, you are only identifying 15,000 of the 40,000 potentially we should be withholding?

Mr. THOMPSON. I would not admit to the estimate. There is a potential—

Mr. BUNNING. You have a disagreement with the GAO report?

Mr. THOMPSON. I have not read the GAO report, and I don't know where they got their 40,000.

Mr. BUNNING. Is it true you have agreements with everyone but the State of Florida?

Mr. THOMPSON. Yes.

Mr. BUNNING. Why do you not have one with Florida since they seem to have the same Bureau of Prisons operating in Florida that operates in all other States.

Mr. THOMPSON. My understanding is Florida has a set of concerns and, of course, in some sense you have to ask the State of Florida why they don't have an agreement with us. I can give you secondhand what I understand their concerns to be. They want us to indemnify them in case they supply us erroneous information, we cut off the benefit, and then the individual whose benefit was cut off erroneously decides to sue.

Mr. BUNNING. Either someone is a convicted felon or they are not.

Mr. THOMPSON. Well, mistakes can be made in supplying data. I guess the fear is that somehow incorrect information gets supplied to Social Security and that Social Security acts on that and cuts off benefits.

Mr. BUNNING. What would you suggest, then, to the Social Security lawmakers, the ones on this committee, that would clean up the problem and make it easier to enforce the law that now is on the books?

Mr. THOMPSON. If you want to help us enforce the law that is on the books, you would have to find some way to require States to send us these reports monthly. Most States now give them to us quarterly. You could, if you wanted to—this is a judgment you will have to make—find some way that said States will be denied some benefits that flow from Washington unless they contribute—unless they supply SSA with data on a timely basis.

Mr. BUNNING. Well, you are speaking about the Federal Bureau of Prisons, then.

Mr. THOMPSON. And the States.

Mr. BUNNING. What I am saying is that we could have some recourse with the Federal Bureau and also enforce it with the then controlled State-convicted felons?

Mr. THOMPSON. Yes.

Mr. BUNNING. And you are suggesting that we have a stick and a carrot?

Mr. THOMPSON. No. You asked me how you could do that and I said that this is a judgment that you have to make—whether, in the context of intergovernmental relations, the Federal Government should use that stick.

It has plenty of sticks available and it has to select when to use them and when not to. I have to leave it to you to decide whether this is a case where it is an important enough issue that you want to use that stick.

Mr. BUNNING. Thank you.

Chairman JACOBS. Mr. Jefferson.

Mr. JEFFERSON. Mr. Chairman, thank you for recognizing me.

I apologize if I cover ground that has already been covered, as much of you just saw, I arrived at the hearing moments ago. It is my impression from the questioning of Representative Bunning, the bill that is before us that we are discussing here and have testimony with respect to would apply in both Federal and State institutions.

I want to ask, and I know now there are laws on the books that suspend benefits for disabled felons and for persons convicted of a felony in a general sense. Do you see any distinction between the application of a suspension law in those two instances and the application of the law in the instance of the criminally insane?

Are there differences in their needs for support? Is there any reason why we ought to apply the law differently in the cases of the two that the law now applies to and these individuals we are now talking about?

Can we lump them all together and without distinction or should we make some distinction in the case of the criminally insane?

Mr. THOMPSON. I think that there is a large class of beneficiaries who are found not guilty by reason of insanity, whom most people would look at and say that they look just like the people who were found guilty and are in prison, and we can find no reason not to treat them exactly the same way as the ones who are found guilty and have gone to prison and have their benefits withheld.

So I am saying to you that there is a large number of people who would clearly fit in that category. I would think that the ones we have heard about today would clearly fit in that category.

There is a concern that we be careful, that we do not sweep everybody into the category. Remember, if you are committed to a mental institution, you may be committed for something which is not so heinous as the examples we have heard. I mean, attempting to commit suicide remains a felony in some States. I don't know if somebody has been prosecuted under it recently, but it is conceivable that somebody could go to a mental institution for attempting to commit suicide and be caught in this.

Now, we need to think this through—there is no piece of legislation that can ever perfectly define the class and it may be that that is just the risk we have to take. You need to think that through.

There is also yet a third category of people who, as I understand it, will not be caught by this legislation, will not fall under its provisions. I don't know whether there is a way of handling it—we may want to think about that too—that is, the people who never go to trial.

I mean, they are judged incompetent to stand trial and they are confined to a mental institution. They could have committed the exact same offense.

Chairman JACOBS. Would the gentleman yield?

Mr. JEFFERSON. Yes.

Chairman JACOBS. We have anticipated that and as author of the bill, I plan to offer that as an amendment as well as some of the other caveats the gentleman has raised.

They have occurred to us. This is the first draft so we intend to do what we can to cover those ambiguities.

Mr. THOMPSON. Good.

Chairman JACOBS. Thank the gentleman for yielding.

Mr. JEFFERSON. Thank you.

That clears up part of what my next question would have been so let me change the subject here.

In the written testimony of the attorney for the National Alliance for the Mentally Ill, it is contended that in some cases the State assumes the role of representative to receive pay of individuals who are in a status of not guilty by reason of insanity.

Are you familiar with this practice and in such instances is the State actually allowed to retain part of the fund for the residential and treatment costs?

Mr. THOMPSON. That could happen. The State would be the representative payee. Some of these mental institutions, as well as the prisons, have policies where they charge the prisoner or the person that has been incarcerated.

We don't know that their collection rate is very high, nonetheless, they charge them. There is no reason to believe, in the situation you posit, that this person could be a representative payee and then pay to support or help support the cost of maintaining the inmate.

Mr. JEFFERSON. Well,——

Mr. THOMPSON. In that situation, obviously the initial impact is on the State that would lose some of the money that is being used to offset the cost of incarceration. I don't know that that is——

Mr. JEFFERSON. Is there a need to provide for some transition if the States are relying on it in that way?

Mr. THOMPSON. We estimate that the provision will cover about 1,500 people and save about $10 million. I am not sure that the number of States that are representative payees and the number of cases is going to be high enough that we really need to think about a long transition period.

Mr. JEFFERSON. Last thing, what about the differences between State institutions? You can lump them into one category if you wanted to and a lot of Federal institutions are very different from place to place with respect to the support they give and the provisions that are made available to the prisoners.

Should a law take into account those differences from State to State?

Mr. THOMPSON. I think it would be pretty hard to do that. I think you really want to establish the principle here that, as a general proposition, this is the way title II of the Social Security Act works—people in this situation should be treated this way and it doesn't really allow for a fine tuning.

That is really the role of other programs that have been created.

Mr. JEFFERSON. I don't have any questions.

Chairman JACOBS. Well, I think that is sufficient. We appreciate your testimony, Mr. Thompson, and your stewardship in the interregnum.

One more time, if you testify, you may come in under the King rule we passed.

Our final—well, it is a group of witnesses, the final panel, Congressional Research Service, Elizabeth Bazan; Karl Knudsen, attorney, Raleigh, N.C., and National Alliance for the Mentally Ill, Ron Honberg, legal counsel.

Ms. Bazan, you get to go first.

STATEMENT OF ELIZABETH B. BAZAN, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

Ms. BAZAN. Thank you, Mr. Chairman, and members of the subcommittee.

Just to identify myself, I am a legislative attorney with the American Law Division at the Congressional Research Service, and in keeping with the Congressional Research Service's role, I will not be advocating a petition for or against the bill, but rather I will be providing an objective examination of possible constitutional issues and pertinent legal principles.

I am honored to be here to address these issues. I have a brief opening statement and then I would be happy to answer any questions that the subcommittee may have.

There appear to be four possible theories upon which a constitutional question might be raised with regard to H.R. 979. These include due process, equal protection, ex post facto and bill of attainder grounds.

An examination of the existing case law in each of these fields suggests that the measure here at issue would be likely to withstand constitutional challenges on any of these grounds.

Two possible theories might be raised to support a constitutional question arising out of due process protections. First, one might question whether the proposed change would effect a taking without due process of law in violation of the Fifth Amendment.

The underlying premise here appears to be that the beneficiaries would have a vested property right in their Social Security benefits. This argument has been rejected by the Supreme Court in *Flemming* v. *Nestor*. The court noted the need for flexibility in the Social Security system to meet changing conditions, which is reflected in the Congress' express reservation to itself in the law of the right to alter, amend or repeal any provision of the act.

The Nestor court emphasized that the Social Security program was noncontractual and that eligibility was dependent upon the earnings record of the primary beneficiary rather than upon contributions to the program by payment of taxes. The system was characterized as a form of social insurance enacted pursuant to Congress' power to spend money in aid of the general welfare.

A second due process issue is whether the operative statutory provision would amount to an arbitrary governmental classification unrelated to any legitimate governmental goal.

Under the rational basis test articulated by the Nestor court, a statute is unconstitutional if it is patently arbitrary and utterly lacking in a rational justification. In subsequent cases, statutory classifications which had the effect of denying or reducing Social

Security benefits to a specific group have been upheld where a rational basis may be hypothesized to support the classification.

The postulated rationale need not in fact form the basis for the legislation; and, in addition, so long as the classification is supported by a rational basis, the court has deemed it irrelevant that the classification did not include all that should logically or might logically be included within that classification.

The relative need of the recipient is one of the considerations which may be taken into account in determining the rationality of a particular classification and a classification concentrating the limited funds available where the needs are likely to be the greatest has also been found to be rationally based.

Similarly, equal protection challenges to Social Security classifications have been rejected where the classification is rationally based and free from invidious discrimination. Those Social Security classifications which have been deemed constitutionally unsound under due process or equal protection principles have generally involved gender or illegitimacy. In these sorts of cases the court has applied a higher standard of review and has imposed a greater burden upon the government to demonstrate that the classification serves important governmental objectives.

Turning to H.R. 979, it appears that a due process challenge to the measure would be likely to fail. A court would be unlikely to find that the affected beneficiaries have a vested property right in their benefits, such that its deprivation would effect a taking without due process of law, and, in addition, I think it unlikely that the court would find that such a change in the Social Security laws would be arbitrary or unrelated to any legitimate governmental purpose.

I think the proposed changes could be rationally justified on several related grounds. The first of these is that the provision of Social Security benefits to those already housed and cared for at governmental expense in an institution following the finding of not guilty by reason of insanity would be a duplicative drain on public coffers where the needs of the individual were already being met.

A second related ground would be that the suspension of payment of Social Security benefits during the period of institutionalization after a person is found not guilty of a felony by reason of insanity maximizes the opportunity for the limited financial resources available under the Social Security program to be expended to those of greatest need.

In addition, the possibility of reinstatement of benefits if the institutionalized person is actively and satisfactorily participating in a court approved rehabilitation program and has met the statutory criteria for such reinstatement might be seen as encouraging rehabilitation.

In response to an equal protection challenge, the proposed statutory language would seem likely to pass constitutional muster based upon a two-pronged analysis. The precedents in this area suggest that the proposed change would be found rationally related to legitimate governmental interests and not based on invidious discrimination, and I think the rational bases which would be used to overcome a due process challenge could be equally applicable to a challenge under the equal protection provisions.

One might also look at H.R. 979 under ex post facto or bill of attainder provisions of the Constitution and consider whether it might be challenged on those bases.

The ex post facto prohibition applies only to penal or criminal statutes or to laws which, although nominally civil, make criminal an act which was innocent when done or which inflict greater punishment than the law annexed to the crime at the time it was committed.

This does not appear to be a criminal or penal statute and it does not criminalize previously innocent behavior.

The question then becomes; Would it impose an additional punishment upon an individual, following a judgment in a criminal case, which was not already available at the time of the commission of an offense?

Certainly the denial of noncontractual benefits to a person institutionalized at governmental expense under these circumstances is not something that has traditionally been considered as a penal sanction, such as fine or imprisonment or death.

Rather, the deprivation seems likely to be regarded as more akin to a regulation designed to avoid duplication of payment from public coffers where the needs of the institutionalized person to housing, food and medical care are already being met.

A final constitutional issue is that arising under the bill of attainder provisions. A bill of attainder is a legislative act, no matter what its form, that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment upon them without judicial trial.

There is a three-part test that has been articulated by the Supreme Court in its decision in *Nixon* v. *Administrator of General Services,* and those three parts which are articulated there are: Whether the law imposed a punishment traditionally judged to be prohibited by the clause; whether the law, viewed functionally in view of the type and severity of the burden imposed, could rationally be said to further nonpunitive legislative purposes; and whether the law has a legislative record envincing a Congressional intent to punish.

Applying those principles to the proposal at hand, one could argue that the measure would be a legislative act which would be applicable to an easily ascertainable group. However, it does not impose a punishment traditionally prohibited by the clause; and avoiding duplication of governmental expenditures where an individual's needs are being met and maximizing the limited financial resources available to the program for use for those most in need would seem likely to be regarded as furthering nonpunitive legislative purposes.

In addition, the possibility of reinstatement of the institutionalized person's benefits if he or she is actively and satisfactorily participating in a court approved rehabilitation program where the secretary has found an expectation of substantial gainful employment upon release and within a reasonable time could be seen as furthering another nonpunitive legislative purpose of encouraging rehabilitation.

An analysis of the third prong of the Nixon Court's test to the proposal now before the subcommittee would be, of necessity, spec-

ulative since its legislative history is still evolving, but it might be noted that ex post facto and bill of attainder challenges to suspension of prisoners' disability benefits have been rejected in a number of appellate and District Court opinions.

To summarize, it appears likely that H.R. 979 would be found constitutionally sufficient in the face of challenges under any of these constitutional principles.

Chairman JACOBS. Thank you, Ms. Bazan.

[The prepared statement and attachment follow:]

Testimony of Elizabeth B. Bazan on H.R. 979 before the Social Security Subcommittee of the House Committee on Ways and Means

Mr. Chairman and Members of the Subcommittee, my name is Elizabeth Bazan. I am a Legislative Attorney with the American Law Division of the Congressional Research Service. In keeping with the Congressional Research Service's role, I will not be advocating a position for or against the bill, but rather I will be providing an objective examination of possible constitutional issues and pertinent legal principles. I am honored to be here today to address possible constitutional issues which might be raised regarding H.R. 979. I have a brief opening statement, and then I would be happy to answer any questions that the Subcommittee may have. It is my understanding that the Members of the Subcommittee have copies of the memorandum on these issues that I prepared for the Subcommittee earlier this year. It explores, in greater depth, the issues and operative legal principles that I will touch upon today. My remarks will therefore simply highlight some of the salient points.

There appear to be four possible theories upon which a constitutional question might be raised with regard to H.R. 979. These include due process, equal protection, *ex post facto*, and bill of attainder grounds. An examination of the existing case law in these fields suggests that the measure here at issue would be likely to pass constitutional muster in the face of a challenge on any of these grounds.

Two possible theories might be raised to support a constitutional question arising out of due process protections. First, one might question whether the proposed change would effect a taking without due process of law in violation of the Fifth Amendment. The underlying premise of such an argument would seem to be that the beneficiaries have a vested property right in their Social Security benefits. This argument has been rejected by the Supreme Court in *Flemming v. Nestor*, 363 U.S. 603 (1960). The Court noted the need for flexibility in the Social Security System to meet changing conditions, which is reflected in Congress' express reservation to itself in the law "[t]he right to alter, amend or repeal any provision" of the Act. 42 U.S.C. § 1304. The *Nestor* Court emphasized that the Social Security program was non-contractual, eligibility being dependent upon the earnings record of the primary beneficiary rather than upon contributions to the program by payment of taxes. The system was characterized as "'a form of social insurance, enacted pursuant to Congress' power to 'spend money in aid of the 'general welfare,' *Helvering v. Davis*, [301 U.S. 619], at 640, ..."

A second due process issue is whether the operative statutory provision amounted to an arbitrary governmental classification, unrelated to any legitimate governmental goal. Under the rational basis test articulated by the *Nestor* Court, a statute is unconstitutional if it is "patently arbitrary" and "utterly lacking in rational justification." In subsequent cases, statutory classifications which have the effect of denying or reducing social security benefits to a specific group have been upheld where a rational basis may be hypothesized to support the classification. *Weinberger v. Salfi*, 422 U.S. 749 (1977); *Mathews v. DeCastro*, 429 U.S. 181 (1976). The postulated rationale need not, in fact, form the basis for the legislation. In addition, so long as the classification is supported by a rational basis, the Court has deemed it irrelevant that the classification did not include all that should logically be included within that classification. *Califano v. Jobst*, 434 U.S. 47 (1977). The relative need of the recipient is one of the considerations which may be taken into account in determining the rationality of a particular classification. *Mathews v. DeCastro, supra*; *Califano v. Jobst, supra*. A classification concentrating the limited funds available where the need is likely to be the greatest has also been found to be rationally based. *Bowen v. Owens*, 476 U.S. 340, 350 (1986).

Similarly, equal protection challenges to social security classifications have been rejected where the classification is "'rationally based and free from invidious discrimination.'" *Richardson v. Belcher*, 404 U.S. 78 (1971), *reaffirming, Flemming v. Nestor, supra.* Those Social Security classifications which have been deemed constitutionally unsound under due process and equal protection standards have been based upon either gender, *see, e.g., Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), or illegitimacy, *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *but see, Mathews v. Lucas*, 427 U.S. 495 (1976). In these sorts of cases, the Court has applied a higher standard of review, and has imposed a greater burden upon the government to demonstrate that the classification serves important governmental objectives.

Turning to H.R. 979, it appears that a due process challenge to the measure would fail. A court would be unlikely to find that the affected beneficiaries have a vested property interest in their benefits, such that its deprivation would constitute a taking without due process of law. In addition, it appears unlikely that a court would find such a change in the Social Security laws arbitrary and unrelated to any legitimate governmental purpose. The proposed changes could be found rationally justified on several related grounds. The first of these is that the provision of social security benefits to those already housed and cared for at governmental expense in an institution following a finding of not guilty by reason of insanity would put a duplicative drain on public coffers in a circumstance where the individual's needs were already being met. A second, related ground is that the suspension of payment of Social Security benefits during the period of institutionalization after a person is found not guilty of a felony by reason of insanity maximizes the opportunity for the limited financial resources available under the Social Security program to be expended for those in greatest need. In addition, the possibility of reinstatement of benefits where the institutionalized person is participating in an approved rehabilitation program also could be seen as encouraging rehabilitation.

In response to an equal protection challenge, the proposed statutory language would seem likely to pass constitutional muster based upon a two-pronged analysis. The precedents in this area suggest that the proposed change in the law would be found rationally related to legitimate governmental interests and not based on invidious discrimination. This is not the type of classification which would traditionally require strict scrutiny. Instead, a rational basis test would be applied, and the same arguments which would seem to support a finding of rational basis under the due process analysis would also seem to obtain in the face of an equal protection analysis.

One might argue that the fact that these same rationales might also support the deprivation of benefits to all individuals institutionalized at governmental expense would amount to disparate treatment of similarly situated beneficiaries giving rise to equal protection and due process questions. However, this argument has been rejected by the Court in *Califano v. Jobst, supra.* There the Court found irrelevant to its rational basis analysis the fact that the classification did not include all that logically should or might have been included in a classification. So long as a rational basis can be asserted to support the classification as drawn, that is sufficient under the Court's analysis. The court's review is deferential to congressional decisions regarding appropriate expenditure of money to improve the public welfare. *Bowen v. Gilliard*, 483 U.S. 587, 598 (1987). As the Court in *Bowen v. Gilliard* stated:

> This standard of review is premised on Congress' "plenary power to define the scope and the duration of entitlement to . . . benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program." . . .

Id. Equal protection and due process challenges to similar suspensions of social security benefits to imprisoned felons under 42 U.S.C. § 402(x) and disability benefits to prisoners under former 42 U.S.C. § 423(f)(1) have been unsuccessful.

Another question which might arise would be whether the proposed change to the Social Security laws would violate the constitutional prohibition of *ex post facto* laws. This prohibition applies only to penal or criminal statutes or to laws which, although nominally civil, "[make] criminal an act which was innocent when done, or which [inflict] greater punishment than the law annexed to the crime when committed . . . ." *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 393 (1798). This does not appear to be a penal or criminal statute. Since the H.R. 979 proposal does not criminalize previously innocent behavior, the question would be whether it would impose an additional punishment upon an individual following a judgment in a criminal case which was not available at the time of the commission of the offense. Certainly, the denial of non-contractual benefits to a person institutionalized at governmental expense following a finding of not guilty by reason of insanity is not something which has traditionally been regarded as a penal sanction, such as a fine, imprisonment, or death. Rather, such a deprivation of Social Security benefits seems likely to be regarded as more akin to a regulation designed to avoid duplication of payment from public coffers (whether State or Federal) where the needs of the institutionalized person to housing, food, and medical care are already being met. The proposal does not appear to deprive the individual of future benefits should they cease to be institutionalized, nor does it deprive his or her dependents of their Social Security benefits.

A final constitutional issue which might arise is whether the proposed amendment would run afoul of the constitutional prohibition against bills of attainder. A bill of attainder is a legislative act "no matter what [its] form, that [applies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." *United States v. Lovett*, 328 U.S. 303, 315 (1946). In the Supreme Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), a three part test was applied in determining whether a measure was a bill of attainder: Whether the law imposed a punishment traditionally judged to be prohibited by the clause; whether the law, viewed functionally in terms of the type and severity of burdens imposed, could rationally be said to further nonpunitive legislative purposes; and whether the law had a legislative record evincing a congressional intent to punish.

Applying these principles to the proposal at hand, one could argue that the measure would be a legislative act which would apply to easily ascertainable members of a group. However, H.R. 979 does not impose a punishment traditionally prohibited by the clause. Avoiding duplication of governmental expenditures where an individual's needs are already being met at government expense, and maximizing the limited financial resources available to the program for use for those most in need would seem likely to be rationally regarded as furthering nonpunitive legislative purposes. In addition, the possibility of reinstatement of the institutionalized person's benefits when he or she is actively participating in an approved rehabilitation program with an expectation of substantial gainful activity upon release could be seen as furthering another nonpunitive legislative purpose of encouraging rehabilitation. An analysis of the application of the third prong of the *Nixon* Court's test to the proposal now before the Subcommittee would be, of necessity, speculative as its legislative history is still evolving. It might noted, however, that *ex post facto* and bill of attainder challenges to suspension of prisoners' disability benefits have been rejected in a number of appellate and district court opinions. *See, e.g., Andujar v. Bowen*, 802 F. 2d 404, 405 (11th Cir. 1986); *Peeler v. Heckler*, 781 F.2d 649 (8th Cir. 1986); *Jensen v. Heckler*, 766 F.2d 383 (8th Cir.), *cert. denied*, ___ U.S. ___, 106 S. Ct. 311 (1985); *Hopper v. Secretary of Health & Human Services*, 780 F.2d 1021 (6th Cir. 1985), *off'g without opinion*, 596 F. Supp. 689 (M.D. Tenn. 1984), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1522 (1986).

To summarize, it appears likely that H.R. 979 would be found constitutionally sufficient in the face of challenges under equal protection, due process, *ex post facto* or bill of attainder theories. Thank you.

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April 21, 1993

TO : House Committee on Ways and Means
Social Security Subcommittee
Attention: Elaine Fultz

FROM : American Law Division

SUBJECT : Examination of Possible Constitutional Issues Re: H.R. 979

This memorandum is submitted in response to your request for an examination of a number of possible constitutional issues which might be raised regarding H.R. 979. This measure would amend title II of the Social Security Act, Section 202(x), 42 U.S.C. § 402(x), to read:

> Limitations on Payments to Prisoners *and Certain Other Inmates of Public Institutions*
>
> (x)(1) Notwithstanding any other provision of this title, no monthly benefits shall be paid under this section or under section 223 to any individual for any month during which such individual is confined in a jail, prison, or other penal institution or correctional facility, pursuant to his conviction of an offense which constituted a felony under applicable law, *or is confined in any public institution by a court order pursuant to a verdict*[1] *that the individual is not guilty of such an offense by reason of insanity (or by reason of a similar finding, such as a mental disease, a mental defect, or mental incompetence,)* unless such individual is actively and satisfactorily participating in a rehabilitation program which has been specifically approved for such individual by a court of law and, as determined by the Secretary, is expected to result in such individual being able to engage in substantial gainful activity upon release and within a reasonable time.
>
> (2) Benefits which would be payable to any individual (other than a confined individual to whom benefits are not payable by reason of paragraph (1),) shall be payable as though such confined individual were receiving such benefits under this section or section 223.

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[1] It might be noted in passing that the term "verdict" is generally defined as the formal decision or finding of a jury. If you wish to cover a situation in which the determination that a defendant is not guilty by reason of insanity is made by a court, you may wish to consider whether you would wish to substitute "finding" for "verdict."

> (3) Notwithstanding the provisions of section 552a of title 5, United States Code, or any other provision of Federal or State law, any agency of the United States Government or of any State (or political subdivision thereof) shall make available to the Secretary, upon written request, the name and social security account number of *any individual confined as described in paragraph (1) if the jail, prison, penal institution, correctional facility, or other public institution to which such individual is so confined is under the jurisdiction of such agency and the Secretary requires such information to carry out the provisions of this section.*[2]

The amendments would become effective as to benefits for months commencing 90 days after the date of the bill's enactment into law.

While a number of constitutional issues might be raised with respect to this proposal, none appear likely to support a successful challenge to the constitutional sufficiency of the measure. Constitutional questions might arise on due process, equal protection, ex post facto and bill of attainder grounds. Each of these will be considered in the following discussion.

One such question might be whether such a change in the law, by potentially depriving some possible social security recipients of benefits they would otherwise receive, would effect a taking without due process of law in violation of the Fifth Amendment. Such an argument would seem to presume that beneficiaries possess a vested property right in their social security benefits. This argument was clearly rejected by the Supreme Court in its decision in *Flemming v. Nestor*, 363 U.S. 603 (1960). Justice Harlan there stated:

> To engraft upon the Social Security System a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands. . . . It was doubtless out of an awareness of the need for such flexibility that the Congress included in the original Act, and has since retained, a clause expressly reserving to it "[t]he right to alter, amend or repeal any provision" of the Act. § 1104, 49 Stat. 648, 42 U.S.C. § 1304. That provision makes express what is implicit in the institutional needs of the program . . . .
>
> We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment.

Id., at 610.

The *Nestor* Court emphasized that the Social Security program was non-contractual, eligibility being dependent upon the earnings record of the primary

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[2] Proposed amendments to existing language are reflected by italics.

beneficiary rather than upon contributions to the program by payment of taxes. The Court characterized the system as

> a form of social insurance, enacted pursuant to Congress' power to "spend money in aid of the 'general welfare,'" *Helvering v. Davis*, [301 U.S. 619], at 640, whereby persons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents. Plainly the expectation is that many members of the present work force will in turn become beneficiaries rather than supporters of the program. But each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.

363 U.S., at 609.

Further, the Court rejected the argument that the statutory provision there at issue, which terminated social security benefits to aliens deported for affiliation with the Communist Party, amounted to an arbitrary governmental classification violative of the Due Process Clause protections. Acknowledging that the interest of a covered employee rose to a level which entitled it to protection from arbitrary government action, the Court then applied a "rational basis" test to determine whether due process constraints had been exceeded. Under the test applied a statute offends constitutional standards if it is "patently arbitrary" and "utterly lacking in rational justification." 363 U.S., at 611. The Court's role is not to re-evaluate the wisdom of the choices made by Congress, but rather to assess whether the Congress could rationally have determined that, in this case, public funds should not be used for the support of those deported for particular purposes.

Flemming v. Nestor was reaffirmed in *Richardson v. Belcher*, 404 U.S. 78 (1971), where the Court upheld a statutory provision in the Social Security Act which required social security benefits to be reduced in cases where workmen's compensations payments were received against a Fifth Amendment Due Process Clause challenge. In *Richardson v. Belcher*, the Court also considered an Equal Protection Clause challenge to this provision:

> The appellee argues that the classification embodied in § 224 is arbitrary because it discriminates between those disabled employees who receive workmen's compensation and those who receive compensation from private insurance or from tort claim awards. We cannot say that this difference in treatment is constitutionally invalid. . . . A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is "rationally based and free from invidious discrimination."

404 U.S., at 81. Among the possible rational bases suggested by the Court for the distinction between those receiving workmen's compensation and those who were not were: The statute might reflect a judgment by the Congress that the payment of duplicative benefits reduced the incentive of a worker to return to his or her job, thereby impeding the rehabilitative efforts of state programs. Alternatively, Congress could have rationally distinguished state programs from private insurance benefits, as state programs were originally initiated to address a need not adequately met by private insurance and tort programs, and determined that this need should continue to be met primarily by the states.

More recently, the Court has considered a large number of cases regarding alleged improper classifications among social security beneficiaries, upholding nearly all of these classifications. Statutory classifications which have had the effect of denying or reducing social security benefits to a specific group have been upheld where a rational basis may be hypothesized for the classification. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749 (1975); *Mathews v. De Castro*, 429 U.S. 181 (1976). Further, the Court has deemed irrelevant the fact that the postulated rationale did not, in fact, form the basis for the legislation, or that the classification did not include all that logically should be included. *Califano v. Jobst*, 434 U.S. 47 (1977). Among the considerations which may be taken into account in determining the rationality of a particular classification are administrative convenience, *Weinberger v. Salfi, supra; Mathews v. Lucas*, 427 U.S. 495 (1976); and the relative need of the recipient, *Mathews v. De Castro, supra; Califano v. Jobst, supra*. In addition, the Court has found constitutionally sound classifications which differentiated between the survivor benefits to which a wage earner's widowed spouse who remarried after age 60 was entitled from those to which a similarly situated divorced widowed spouse who remarried was entitled. The Court found a rational basis for this distinction based upon perceived differing levels of dependency upon the wage earner's account, concentrating the limited funds available where the need was likely to be the greatest. *Bowen v. Owens*, 476 U.S. 340, 350 (1986).

Those few found constitutionally deficient under Fifth Amendment standards were those where the statutory classifications were based upon either gender or legitimacy of birth. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199 (1977) (gender); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (gender); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (illegitimacy); *but see, Mathews v. Lucas*, 427 U.S. 495 (1976) (upholding under less than strictest scrutiny analysis Social Security Act statutory scheme providing entitlement to survivor benefits based upon statutory presumption of child's dependency at time of deceased insured's death as demonstrated by legitimate birth, legal adoption, support order, paternity decree, or fact that the child would be entitled to inherit personal property from the insured parent's estate under applicable state's intestacy law). In cases like *Goldfarb*, *Weisenfeld*, and *Jiminez*, the Court has applied a higher standard of review, and has imposed a greater burden upon the government to demonstrate that the classification serves important governmental objectives.

In its 1970 decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court articulated a theory of statutory entitlements as a form of property

protected against deprivation without procedural due process. Nevertheless, the *Flemming v. Nestor* "rational basis" test continues to set the standard by which one must consider limitations on the power of Congress to modify laws which grant statutory entitlements. *Dandridge v. Williams*. 397 U.S. 471 (1970). For example, in its 1987 decision in *Bowen v. Gilliard*, 483 U.S. 587 (1987), the Court considered due process, equal protection and takings challenges to a change in the statutory scheme for Aid to Families with Dependent Children, a means-tested, cash benefit federal program under Title VI of the Social Security Act. Beginning in 1975, the AFDC provisions conditioned eligibility for the program on applicants' assignment to the State of any right to receive child support payments for any family member included in the family unit for AFDC purposes. However, a recipient of aid could exclude a child for whom support payments were received from the family unit for AFDC purposes, even if the child continued to live with the family, if it was financially beneficial to the recipient to do so. Changes in this program contained in the Deficit Reduction Act of 1984 required a recipient to count all children living in the same home as part of the family unit, including children for whom child support payments were made. Under another provision, the first $50 of child support collected each month by the State was to be remitted to the family, and was not to be counted as income for purposes of determining the family's benefit level. Thus, depending upon the scale of child support received, a family might end up losing income as a result of the 1984 amendments as compared with its income level under the previous statutory scheme. To determine whether the due process or equal protection challenges to this new statutory structure were meritorious, the Court stated that:

> The precepts that govern our review of appellee's due process and equal protection challenges to this program are similar to those we have applied in reviewing challenges to other parts of the Social Security Act:
>
> > "[O]ur review is deferential. 'Governmental decisions to spend money to improve the general public welfare in one way and not in another are "not confided to the courts. The discretion belongs to Congress unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment"' *Mathews v. De Castro*, 429 U.S. 181, 185 (1976), quoting *Helvering v. Davis*, 301 U.S. 619, 640 (1937." *Bowen v. Owens*, 476 U.S. 340, 345 (1986).
>
> This standard of review is premised on Congress' "plenary power to define the scope and the duration of the entitlement to . . . benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program." . . .

483 U.S., at 598. The Court, applying a rational basis test, held that the new statutory scheme did not violate the due process or equal protection provisions of the Fifth Amendment. The Court concluded that the new statutory scheme

served two congressional goals: decreasing the federal deficit while distributing benefits among competing needy families in a fair manner. *Id.*, at 598-99. The Court also deemed it rational and reasonable for Congress to conclude that child support benefits provided benefits to entire family units receiving them. *Id.*, at 600.

Applying the above jurisprudence to the proposed amendment to 42 U.S.C. § 402(x), it seems unlikely that a court would find the proposed provision unconstitutional under a Fifth Amendment analysis. Recipients of Social Security benefits have no vested property right in those benefits. *Nestor* and its progeny clearly indicate that the recipient does not have an accrued right to the benefits, such that defeasance would be violative of the Due Process Clause. The Act does not impose contractual obligations. Indeed, Congress expresely reserved to itself the right to alter, amend, or repeal any provision of the Social Security Act.

The determination to eliminate benefits to those committed under court order based upon a finding of not guilty by reason of insanity or its equivalent, where they have not met certain rehabilitative conditions, could be held violative of due process constraints if deemed an arbitrary governmental classification. The Court has applied a rational basis test to such classifications. The deprivation of these Social Security benefits to such individuals could be found rationally related to legitimate governmental goals. The Congress could conclude that a person so committed would be institutionalized at government expense. Payment of Social Security benefits to an individual so committed where governmental sources (whether state or Federal) are already paying his or her living costs (such as food, housing, and medical care) might be regarded as duplicative. *Cf. Bowen v. Gilliard, supra.* Such a classification would seem to make Social Security benefits available when needed, but not when those needs were otherwise met. It does not appear to deprive the person committed pursuant to such a finding of future eligibility for benefits at such time as he or she is no longer so institutionalized. This sort of classification might also be regarded as furthering a governmental goal of making available limited Federal funds in the Social Security system to those most in need of such "social insurance."

Nor does the proposed amendment appear to give rise to constitutional deficiencies under an equal protection analysis. The statutory scheme would be likely to be found unconstitutional under equal protection parameters if not rationally related to legitimate governmental interests or if based upon invidious discrimination. This is not a type of classification which has traditionally required strict scrutiny. Rather, the courts would appear likely to apply a rational basis test to the proposed language. This being the case, an argument could be made that such a classification was rationally based because it would deprive the institutionalized individual, committed under court order upon a finding of not guilty by reason of insanity or its equivalent, of benefits during the period of institutionalization where his or her needs were already being met at government expense. A secondary argument of maximizing availability of the

funds in the Social Security system to those most in need would also seem available here.

A further argument might be raised that this proposed change to the Social Security Act would amount to an ex post facto law because it imposes an additional sanction following a judgment in a criminal case which was not available at the time the offense was committed. Such an argument would seem to fail, however. In the early case of *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 393 (1798), the Court determined that the constitutional prohibition against ex post facto laws in Article I, Sec. 9, Cl. 3, applied only to penal or criminal statutes.

> But although it is inapplicable to retroactive legislation of any other kind, the constitutional prohibition may not be evaded by giving a civil form to a measure which is essentially criminal. Every law which makes criminal an act which was innocent when done, or which inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution.

Congressional Research Service, *The Constitution of the United States of America, Analysis and Interpretation*, S. Doc. 99-16, 99th Cong. 1st Sess. 382 (1987).

As this statute is not a criminal or penal statute, the issue appears to be whether it would be regarded as inflicting a greater punishment than the law applicable to the offense at the time the crime was committed. In *Flemming v. Nestor*, *supra*, the Court concluded that the statutory provision which terminated payment of old-age benefits to an alien deported because of Communist affiliation was not an ex post facto law. The Court opined that the denial of a non-contractual benefit to a deported alien was not a penalty. Rather it was regarded as a regulation designed to relieve the Social Security system of administrative burdens likely to arise from disbursements to beneficiaries residing outside the United States. In the proposed provision here, one might also argue that the denial of a non-contractual benefit to a person institutionalized by court order pursuant to a finding that he or she was not guilty by reason of insanity, where other conditions were met, was not a penalty. It is certainly not what has been traditionally regarded as a penal sanction, such as death penalty, imprisonment or fine. It seems more akin to a regulation designed to avoid duplication of payment from public coffers (whether state or Federal), where the needs of the institutionalized person to such things as housing, food, and medical care are already being met without the payment of Social Security benefits. It does not appear to deprive the individual of future benefits should they cease to be institutionalized, nor does it deprive dependents of their social security benefits.

Nor is this proposed amendment to 42 U.S.C. § 402(x) likely to suffer from constitutional frailties under a bill of attainder analysis. A bill of attainder is a legislative act "no matter what [its] form, that [applies] either to named individuals or to easily ascertainable members of a group in such a way as to

inflict punishment on them without a judicial trial. . . ." *United States v. Lovett*, 328 U.S. 303, 315 (1946). This has been the focus of analysis in a number of cases. The first two were in 1867. In *Ex parte Garland*, 4 Wall. (71 U.S.) 333 (1867), the Court held unconstitutional a statute which required, as a prerequisite for practicing in federal courts, that attorneys take an oath that they had taken no part in the Confederate rebellion against the United States. *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 (1867), dealt with a state constitutional amendment which conditioned practice of certain professions upon the taking of a similar oath. Both were struck down because they were legislative acts which inflicted punishment upon a specific group, those who had sided with the Confederacy who were therefore unable to truthfully take the oaths required. In *United States v. Lovett*, 328 U.S. 303 (1946), the Court held unconstitutional a statute which prohibited the use of monies appropriated by that statute from being used for the salaries of three named individuals whom the House of Representatives considered subversive and therefore wanted discharged. The Court's decision in *United States v. Brown*, 381 U.S. 437 (1965), struck down a statute which made it a federal offense for a member of the Communist Party to serve as an officer or employee of a labor union. More recently, in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Court upheld a statute which provided custody of documents and recordings accumulated during President Nixon's tenure in office be vested in GSA. It directed that regulations be promulgated providing for public dissemination of some of the materials at issue, and authorized payment of just compensation to President Nixon if a court should determine that the act worked a taking. The Court found that the President, though individually named by the act, could be regarded as "constitut[ing] a legitimate class of one," and that the Congress could "fairly and rationally" focus legislative attention upon that class. The Court applied a three part test in finding that the act was not a bill of attainder.

> . . . 1) the law imposed no punishment traditionally judged to be prohibited by the clause; 2) the law, viewed functionally in terms of the type and severity of burdens imposed, could rationally be said to further nonpunitive legislative purposes; and 3) the law had no legislative record evincing a congressional intent to punish. That is, the Court, looking "to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect", concluded that the statute served to further legitimate policies of preserving the availability of evidence for criminal trials and the functioning of the adversary legal system and in promoting the preservation of records of historical value, all in a way that did not and was not intended to punish the former President.

The Constitution of the United States, Analysis and Interpretation, S. Doc. 99-16, 99th Cong., 1st Sess. 381 (1987), *citing Nixon v. Administrator*, 433 U.S., at 473-484. For a more extensive discussion of bills of attainder, see S. Doc. 99-16, at 378-381.

Turning to the proposed measure at issue here, one could argue that it would apply to easily ascertainable members of a group. Applying the *Nixon* three-pronged analysis to the proposed amendment, it seems likely that the measure would withstand a bill of attainder challenge on the following grounds: First, it seems unlikely that the deprivation of a non-contractual benefit would be considered a traditional penalty. The measure does not impose such traditional penalties as a fine, a term of imprisonment, or the death penalty. Rather, it provides for a cessation of Social Security benefits during the period of the affected individual's institutionalization by court order based upon a verdict of not guilty by reason of insanity or similar finding.

Second, as noted in the due process and equal protection discussion above, the statute might be rationally regarded as furthering non-punitive purposes. Those purposes might include the avoidance of duplicative drains upon public coffers from the payment of Social Security benefits to individuals while they are also receiving such things as housing, food, and medical care at governmental expense, be it federal or state. In addition, one might argue that the measure could be perceived as a means of maximizing the distribution of available resources to those most in need.

As to the third prong, the legislative history of the proposed provision is, of course, not yet complete, so any conclusion drawn here would be based to some degree on supposition. Therefore, rather than draw such surmises, it seems more fruitful to indicate factors that a court might consider in its analysis of the application of the third prong to the measure at hand. This prong looks to whether the legislative history indicates an intention to punish those affected by the provision. This might be indicated, for example, by report language or floor debate reflecting an intent to penalize or to inflict punishment upon those institutionalized by court order based upon a finding of not guilty by reason of insanity because they had committed a criminal offense. On the other hand, if the legislative history indicated that the thrust of the congressional intent was to avoid duplicative drains of governmental resources where an individual's subsistence has been otherwise provided for at public expense, that would not appear likely to be perceived as punitive. Nor would a congressional desire to use federal resources to maximum effect for those in need.

The Court in *Flemming v. Nestor*, *supra*, rejected a bill of attainder and ex post facto challenge to the termination of retirement benefits to an alien deported because of his affiliation with the Communist Party. The Court observed:

> Turning, then, to the particular statutory provision before us, appellee cannot successfully contend that the language and structure of § 202(n), or the nature of the deprivation, requires us to recognize a punitive design. Here the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed, and certainly nothing approaching the "infamous punishment" of imprisonment, as in *Wong Wing*, on which great reliance is mistakenly placed. Moreover, for reasons already given . .

> ., it cannot be said . . . that the disqualification of certain deportees from receipt of Social Security benefits while they are not lawfully in this country bears no rational connection to the purposes of the legislation of which it is a part, and must without more therefore be taken as evidencing a Congressional desire to punish. . . .

363 U.S., at 616-17.

The constitutional analysis above is also supported by the cases arising out of constitutional challenges to the suspension of social security benefits to imprisoned felons under 42 U.S.C. § 402(x), and the suspension of social security disability payments to incarcerated prisoners under former 42 U.S.C. § 423(f)(1). This jurisprudence seems telling here because the first of these provisions is the one here proposed to be amended and the second seems a close parallel.[3] For example, in *Zipkin v. Heckler*, 790 F.2d 16 (2d Cir. 1986), the suspension of a prisoner's social security benefits under 42 U.S.C. § 402(x) was challenged under due process and equal protection grounds. As to the rationale behind passage of this provision, the court stated:

> In enacting section 202(x), Congress apparently based that legislation on the policy rationales underlying a former statute, 42 U.S.C. § 423(f)(1) (now repealed), suspending *disability* payments to incarcerated recipients. *See* H. Conf. Rep. No. 98-47, 98th Cong., 1st Sess., *reprinted in* [1983] U.S. Code Cong. & Admin. News 143, 447-48; *see also, Yopp v. Secretary*, No. G83-1157, slip op. at 5 (W.D. Mi. 1985). Those rationales were principally that: (1) "[t]he disability program exists to provide a continuing source of income to those

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[3] Former 42 U.S.C. § 423(f)(1), which was interpreted in some of the cases referenced here, provided:

> (1) Notwithstanding any other provision of this title, no monthly benefits shall be paid under this section, or under section 202(d) by reason of being under a disability, to any individual for any month during which such individual is confined in a jail, prison, or other penal institution or correctional facility, pursuant to his conviction of an offense which constituted a felony under applicable law, unless such individual is actively and satisfactorily participating in a rehabilitation program which has been specifically approved for such individual by a court of law and, as determined by the Secretary, is expected to result in such individual being able to engage in substantial gainful activity upon release and within a reasonable time.

Section 2(a) of the Act of October 9, 1984, substituted the current subsection 423(f)(1), which does not address this subject, for the one quoted above. Section 2662(i) added subsection 423(h) to the statute. Subsection 423(h) states:

> **(h) Payments to prisoners.** For provisions relating to limitation on payments to prisoners, see section 202(x) [42 U.S.C. § 402(x)].

> whose earnings are cut off because they have suffered a severe disability," and (2) "[t]he need for this continuing source is clearly absent in the case of an individual who is being maintained at public expense in prison." S. Rep. No., [*sic*] 96-986, 96th Cong., 2d Sess., *reprinted in* [1980] U.S. Code Cong. & Admin. News 4787, 4794-95; *see also, Yopp*, slip op. at 5.
>
> The mere fact that Congress did not expressly restate these rationales in enacting section 202(x) [42 U.S.C. § 402(x)] is of no moment. Both the retirement benefit suspension disputed here and the disability benefit suspension are part of a comprehensive scheme designed to provide income to certain members of the workforce who can not [*sic*] generate their own incomes, and to conserve the Social Security fiac when the essential economic purposes of that income is provided through a different public mechanism--a prison.
>
> We can perceive no reason why prisoners whose retirement benefits are suspended would have a need for replacement of income while prisoners whose disability benefits are suspended do not. Rather, prisoners, as a group, do not have the need for a continuing source of income that nonprisoners typically may have. *See Washington v. Secretary*, 718 F.2d 608, 611 (3d Cir. 1983). Indeed, for this reason the suspension of retirement or disability benefits to an incarcerated recipient is analytically no different from the termination of auxiliary benefits, pursuant to 42 U.S.C. § 402(d)(1), due to changed economic circumstances such as the marriage of a dependent child or the divorce of a dependent spouse. . . .
>
> . . .
>
> We thus hold that section 202(x) rationally reflects the policy that prisoners' Social Security retirement benefit payments be suspended since their substantial economic needs are already met. Any contemporaneous payment of Social Security funds in our view would be wasteful. . . .

Id., at 18-19. *See also, Davis v. Bowen*, 825 F.2d 799 (4th Cir. 1987), *cert. denied*, 484 U.S. 1069 (1988); *Graham v. Bowen*, 648 F. Supp. 298 (S.D. Tex. 1986). For cases upholding the suspension of disability payments to prisoners against due process or equal protection challenges, *see, e.g., Jensen v. Heckler*, 766 F.2d 383 (8th Cir.), *cert. denied*, 474 U.S. 945 (1985); *Buccheri-Bianca v. Heckler*, 768 F.2d 1152 (10th Cir. 1985); *Washington v. Secretary, Health and Human Services*, 718 F.2d 608 (3d Cir. 1983); *Anderson v. Social Security Administration, Department of Health and Human Services*, 567 F. Supp. 410 (D. Colo. 1983).

A constitutional challenge to the suspension of Social Security disability benefits was one of the issues raised in *Peeler v. Heckler*, 781 F.2d 649 (8th Cir. 1986). The claim was rejected by the court.

> An *ex post facto* law is one which reaches back in time to punish acts which occurred before enactment of the law. A penal statute may also be an *ex post facto* enactment if it adds a new punishment to the

> one that was in effect when the crime was committed. . . . The appellant contends that § 402(x)(1) as applied to him is such a law, since its sanctions are triggered by the past commission of a felony, and its effect is the forfeiture of a benefit formerly received. However, even if what the appellant says is a true characterization of the statute, we may not hold that it imposes *ex post facto* penalties unless the law was enacted for a punitive purpose. . . . If the law in question is focused on the past crime, then it is likely intended as a punishment, while if the focus is upon the benefit from which the person is barred, it is not, even though the impact on the individual may be harsh. . . . The mere denial of a noncontractual government benefit (such as disability payments) without a showing of penal intent, does not fall within the *ex post facto* prohibition. . . . We are bound by the recent holding of this Court in *Jensen v. Heckler*, 766 F.2d 383 (8th Cir.), *cert. denied*, 106 S. Ct. 311, 88 L.Ed.2d 288 (1985), that, despite some indications that Congress intended § 402(x)(1) to be at least in part punitive, it is not an *ex post facto* law, since there is a rational connection between the provision and the nonpunitive goal of regulating the distribution of disability benefits. 766 F.2d at 386. People in prison have their subsistence needs taken care of by the imprisoning jurisdiction. For this reason, it was entirely rational for Congress to suspend the federal disability payments to thia group of beneficiaries.

Id., at 651-52.

The *Anderson* case also involved a challenge to the suspension of prisoner's disability benefits under ex post facto and bill of attainder analysis. The court stated:

> Plaintiff also alleges that suspension of his disability benefits constitutes a bill of attainder and an *ex post facto* law. A ban on *ex post facto* laws, however, applies only to laws respecting criminal punishment. . . . What is forbidden is penal legislation for conduct which was lawful previous to its enactment. . . . Moreover, to argue successfully for either of these constitutional protections, the plaintiff must be able to characterize validly the suspension of benefits as a punishment. . . .
>
> I find that thia amendment to the Social Security Act is remedial rather than punitive in nature. There has been no attempt to single out a person or class of persons for punishment, but only an effort to further the remedial purposes of the Act, which have been previously discussed. In a somewhat analogous but more severe situation is [*sic*] which a deported alien's retirement benefits were completely terminated, the Supreme Court held that the mere denial of non-contractual government benefits does not constitute punishment within the meaning of the Bill of Attainder Clause. *Flemming v. Nestor, supra*, 363 U.S. at 616-617, 80 S.Ct. at 1375-1376. In the instant case, plaintiff's benefits have only been suspended, not

> terminated. Benefits will become available again to the plaintiff when the state is no longer responsible for providing his food, clothing, shelter and other necessities. There is also an opportunity to have the benefits reinstated while still incarcerated if he becomes eligible through participation in a court[-]approved rehabilitation program. Finally, the statute clearly states that dependents relying on the inmate's disability benefits will continue to receive their benefits while the inmate is confined. These factors cannot be characterized as punitive. The statute is a rational and reasonable attempt by [C]ongress to provide disability benefits for those with a legitimate need for them.

Id., at 412-13.[4] *See also, Hopper v. Secretary of Health & Human Services*, 780 F.2d 1021 (6th Cir. 1985), *aff'g without opinion*, 596 F. Supp. 689 (M.D. Tenn. 1984), *cert. denied*, 475 U.S. 1111 (1986) (not bill of attainder); *Caldwell v. Heckler*, 819 F.2d 133, 134 (6th Cir. 1987) (not ex post facto law); *Jones v. Heckler*, 774 F.2d 997 (10th Cir. 1985) (not ex post facto law); *Jensen v. Heckler*, 766 F. 2d 383 (8th Cir.) *cert denied*, 474 U.S. 945 (1985) (not ex post facto law); *Wiley v. Bowen*, 824 F.2d 1120 (D.D.C. 1987) (not ex post facto law); *Sulie v. Bowen*, 653 F. Supp. 849 (N.D. Ind.), *aff'd without opinion*, 836 F.2d 552 (7th Cir. 1987); *Anderson v. Social Security Administration, Department of Health and Human Services*, 567 F. Supp. 410 (D. Colo. 1983) (not ex post facto law or bill of attainder).

CONCLUSIONS

The proposed measure under examination here would add those who have been institutionalized by court order after a verdict of not guilty by reason of insanity or its equivalent to the list of categories of individuals' whose Social Security retirement or disability benefits may be suspended during the period

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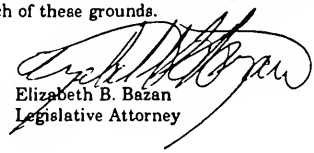
[4] *Cf.*, *Graves v. Heckler*, 607 F. Supp. 1186, 1190 (D.D.C. 1985), rejecting an argument by the Secretary that the plaintiff, who had been committed to a mental institution by court order pursuant to an acquittal by reason of insanity, should be denied disability benefits because his situation was covered by the provision suspending payment of such benefits to persons "confined in a jail, prison, or other penal institution or correctional institution, pursuant to his conviction of . . . a felony . . . ." This argument was rejected on two grounds. First, the court noted that acquittal by reason of insanity did not equate to conviction, and the Secretary had "furnished no indicia of legislative intent to the Court which would support so unusual a construction." Second, the court distinguished a mental hospital from a "jail, prison, or other penal institution or correctional facility;" and found that the government had "produced no evidence that Congress intended to equate a mental hospital with a jail, prison, or other penal or correctional institution." Of course, the court's objections to the lack of statutory basis for suspension of the benefits of a person institutionalized by court order upon a finding of not guilty by reason of insanity and to the absence of indications of legislative intent would be remedied should the proposal here under consideration be enacted.

of their confinement, unless specified rehabilitative conditions are satisfied. This proposal may face due process, equal protection, ex post facto or bill of attainder challenges to its constitutional sufficiency. While this precise language has not been tested heretofore, parallel provisions appear to have been uniformly upheld against challenges on each of these grounds. In light of this consistent case law and the fact that the reasoning and rationales which form the underpinning of these cases would also seem to be applicable to the proposed amendment to 42 U.S.C. § 402(x), it seems likely that the proposal would also pass constitutional muster as to each of these grounds.



Elizabeth B. Bazan
Legislative Attorney

Chairman JACOBS. Mr. Knudsen.

STATEMENT OF KARL E. KNUDSEN, ATTORNEY, RALEIGH, N.C.

Mr. KNUDSEN. Thank you very much, Chairman Jacobs, members of the subcommittees, my name is Karl Knudsen. I am a trial lawyer from Raleigh, North Carolina.

I am here because I have the responsibility of representing some people in my home State and county, not by choice, but because about 3 years ago I was sitting in my office and received a telephone call from my senior resident superior court judge who told me that the legislature in North Carolina had recently changed the law relating to those persons who had been found not guilty by reason of insanity, and they thought that somebody ought to undertake the responsibility of representing those people, and he asked me if I would be willing to do it, and knowing that one does not lightly refuse an offer like that from your senior resident Superior Court judge, I accepted.

I presently represent four individuals who are confined at Dorothea Dix Hospital in Raleigh, N.C., having been found not guilty by reason of insanity. There are three other State hospitals in the State of North Carolina and the current population in the entire State of North Carolina, of those people who have been successful in asserting an insanity defense, is 10.

We are one of the most populous States in the United States, and I think that in the reality, while the insanity defense gets a lot of publicity and there are these sensational cases that get everybody's blood stirred up, the reality of the situation is that people on the street and juries don't buy it when people pretend to be crazy and they don't let people go unless they are really insane.

Now, this bill that is before the Congress on a very shallow level makes some sense. There is a certain appeal to the argument of why should somebody profit by doing something horrible, and that is an easy argument to want to accept and be drawn into.

But as I have sat here and listened to the testimony before this subcommittee, what has been said is, primarily, that these people don't need this benefit. They should not be able to double dip.

The reason the justification for eliminating this benefit is because their needs are already provided for, and to that I say, if you really want to, number 1, save money, and number 2, not provide benefits to people who don't need them, then terminate all Social Security benefits to every mental patient that is in a hospital. Then you don't have to justify the distinction between one class or another.

I guarantee that you will save a whole lot more money if you do that and if that is a justifiable reason for denying these benefits that are provided to other mentally ill people who are not in the hospital, then you won't have to make the nice distinctions between who is going to get benefits and who is not.

If that is the purpose, then that is what you need to do. If, however, the purpose is that this Congress and this committee is so offended by what you have heard that people have done and the fact that there are victims who have been seriously injured, killed, families that have been disrupted, and if what you want to do is to

lash out and punish, then I suggest to you that this is an inappropriate vehicle for doing that.

And the reason I say that is, first of all, you need to understand a little bit about my background. I am a trial lawyer now and I represent defendants. I haven't always been. I spent half of my career as a prosecutor, and for about the last 4 years of it, I prosecuted nothing but felony assault, robbery, rape, murder charges.

I have prosecuted probably somewhere in the neighborhood of 40 to 50 murder cases. I have both prosecuted and defended a triple homicide. I, myself, and my family about 10 years ago were victimized when people came into my house armed with guns in a robbery attempt in my house during which shots were fired at not only me, my wife and my 10-week old baby. I was shot, almost killed, spent a month in the hospital, and when I tell you I don't have any sympathy at all for people who knowingly and intelligently, fully understanding what they are doing, go out and commit crimes, I hope you will understand that I believe those people ought to be punished to the full extent of the law. I am not a bleeding heart. I assure you of that.

But these particular people that would be affected by this bill had their day in court and they were found not guilty, and with all due respect to Ms. Bazan regarding the constitutionality of this bill, one thing needs to be remembered. The Supreme Court has said that when you are talking about people who have been found not guilty by reason of insanity, these people have been found not guilty, they may not be punished.

As the court said, society may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking an insanity defense. And if what you are concerned about is people who may have committed a crime or are doing something wrong and then being denied benefits, as was mentioned by the acting Commissioner of Social Security, what about all the people who never had their day in court?

As I understand it, there may be an amendment that would also make this bill applicable to people who have been found not capable of proceeding to trial.

Just let me say this. If you include those people, then what has happened to the presumption of innocence in this country? How can those people be denied benefits when they are presumed to be innocent and yet have not had their day in court?

In conclusion, I would say this to you: There is no popularity in championing in an unpopular cause. It is not politically advantageous, it is not financially advantageous, but sometimes you have to stand up for what is right no matter how unpopular it is, and I suggest to you gentlemen that you have the opportunity in this case either to do that which is politically expedient and easy, or to do that which is right, and on behalf of my clients and the other people that are locked up in the hospitals who could not be here today, I ask you to do what is right.

Thank you.

Chairman JACOBS. Thank you, Mr. Knudsen.

[The prepared statement follows:]

TO: Ways & Means Subcommittee on Social Security
Rayburn House Office Building
Washington, D.C. 20515

FROM: Karl E. Knudsen, Attorney at Law
Suite 1100, Raleigh Building
5 West Hargett Street
Raleigh, N.C. 27601

RE: Testimony for September 21, 1993
Hearing on H.R. 979

Chairman Jacobs, members of the committee, ladies and gentlemen. My name is Karl Knudsen. I am a trial lawyer from North Carolina, presently in private practice. I was appointed over two years ago by the Senior Resident Superior Court Judge in my district to represent some individuals who will be affected by what you and the other members of Congress decide regarding the issue central to this bill. Unlike many lawyers who appear before committees to argue on behalf of their clients' interests, I would like this committee to know that I am not being paid. It is rather my fear that these lost souls, guilty of no crime yet confined against their will by the State and thus unable to appear here and speak for themselves, will have no voice and will not be heard.

Please understand too that I am not ignorant of the interests of the State nor unsympathetic with the victims of crime. Half of my career as a trial lawyer I spent as prosecutor. During the last several years of my tenure as an Assistant District Attorney, I was primarily assigned to the prosecution of murder cases and other serious violent crime.

About ten years ago, I, my wife, and my eldest daughter who was a 10-week old baby, were the victims of an armed robbery attempt in our home during which shots were fired at all of us. I was hit by a bullet and almost killed.

With my background I hope that you believe me when I say that I have no sympathy for those who knowingly, voluntarily, and fully understanding what they are doing, commit evil acts against the innocent. Those persons should be punished as fully as permitted by our laws, our Constitution and our justice system.

However, I feel HR 979 is wrong both morally and legally. It takes only a cursory look at this bill and a casual listen to the testimony of its proponents, to understand that its true intent is to try to circumvent the findings of judges and juries and to inflict the vengeance which was denied the State by a finding of not guilty. Indeed this bill would apply only to that class of people who were put to the test and were found to lack the consciously evil state of mind which morally justifies the infliction of punishment. The courts have long recognized the blamelessness of those found by their peers to be not guilty by reason of insanity. In discussing the status of an insanity acquittee, the United States Supreme Court said in Jones v. United States, "As he was not convicted, he may not be punished....society may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking an insanity defense."

Present social security rules provide for benefits to persons who have a medically verifiable mental illness which results in their inability to maintain gainful employment. This includes virtually every long-term patient confined in the mental hospitals in my state. It clearly applies to the people I represent and to the other NGRI patients in the North Carolina Mental Hospital System.

The receipt of social security disability funds by patients is expected and factored into the operations of the hospital. Patients are no longer provided with degrading uniforms but are allowed to purchase and own their own clothes and personal belongings. They are expected to provide their own cosmetics, toiletries, books, amusements, cigarettes, and any food other than the subsistence diet provided by the hospital. With no disrespect meant to the dieticians and cooks who prepare it, I can only say that while the food at the hospital may sustain life, it certainly does not enrichen it.

In denying benefits to NGRI mental patients, this bill would create a distinction between them and other mental patients which is not morally or legally justifiable. The NGRI patient can only be kept in confinement as long as he or she remains mentally ill. In the case of each of my clients, it is the government which insists that they are ill and insists that they be deprived of their freedom, including their freedom to work, earn money and to support themselves and their families.

The proponents of this bill argue that it is morally permissible to treat NGRI patients differently than others because the NGRI patients broke the law. There are several errors in this simplistic view.

First, a large number of the persons involuntarily committed to state hospitals (at least in North Carolina) had done illegal acts, often violent, but were never formally charged. Another segment of the hospital's population was formally accused of committing crimes but were found not capable of proceeding to trial or simply had the charges against them dropped because they were now in a hospital. Some patients have charges technically pending for years which in reality will never be prosecuted. What distinction can be made between an insane person who commits a crime, is put to trial, and found not guilty, and an insane person who commits a crime and is never put on trial, which would justify providing benefits to the one not tried and denying them to the one who established his lack of responsibility in a court of law?

Secondly, the law makes no distinction as to the crime of which the patient was acquitted. Under North Carolina Law and the law of a number of states, a person found not guilty by reason of insanity of any crime including petty larceny, trespassing, or disorderly conduct, is automatically committed to a state hospital until he or she can prove by a preponderance of the evidence that her or she is entitled to freedom.

Third, proponents of this bill say that because a person has been found NGRI, he or she was first found by a jury to have committed the crime beyond a reasonable doubt. Whether this is in fact true or not in the case of a full jury trial, is irrelevant to the other 2/3 of my clients who never had a jury trial, but rather, were so obviously mentally ill that a judge merely issued an order that they had a valid insanity defense and entered a verdict of NGRI.

In the area of the insanity defense there is the occasional sensational case which arouses public interest and outcry, while most of the time, the justice system goes about its way processing the other 99.99% of the "ordinary" criminal cases involving the mentally ill. When there is the outcry in the rare, sensational case, it always seems to bring a demand that the system be changed.

This is why we are here and is why this bill exists. As you have heard, one of my clients five years ago killed four people and shot five more before the local authorities finally gave officers on the scene permission to shoot him, bringing the horror of that day to a belated and ugly end. He was subsequently arrested, indicted, and tried in a court of law by a jury of his peers, chosen from citizens of the county where the shootings took place. Psychiatrists for both the State and the defendant testified that the defendant was mentally ill and suffering a severe psychosis at the time. The jury unanimously found that he was unable to understand and appreciate the nature and quality of his actions and the wrongfulness of what he was doing and acquitted him by reason of insanity.

To say that this decision over which that jury agonized was unpopular, would be understatement in the extreme. There was a near-riot of hundreds of people who gathered at the courthouse. Both the Sheriff of Forsyth County (whose department had jurisdiction) and the District Attorney (whose office prosecuted the case) were defeated at the next election.

In the intervening five years, my client has been continuously confined in a State Hospital. After receiving medication for several months, he recovered from his psychosis. He has been symptom free and off medication for over four years.

As word spread of his recovery, and as it appeared that he was no longer confinable under the Law, pressure was brought to bear and the legislature changed the law to keep him confined. When it became apparent that we were going to succeed in having that law declared unconstitutional, it was hurriedly changed yet again. Each of these legislative acts might as well have been designated, "An Act to Keep Michael Hayes a Prisoner", except that there is a constitutional prohibition against acts of the legislature against one person. But as bad as this punitive ex post facto legislation was from the perspective of Mr. Hayes, (or as appropriate as its supporters believed it to be to punish him), it has been far worse in effect to the other nameless unknowns to whom the law also applied. There are people besides Michael Hayes or John Hinkley who have been found NGRI for crimes other than mass murder or attempting to assassinate the President of the United States. These people do not deserve to be caught up in a net designed to catch other, bigger fish.

I urge the members of this committee not to act in haste, not to forge this nation's policy, which affects many, based upon an emotional response to the actions of one or a few. If the purpose of this bill is to punish Michael Hayes or John Hinkley, and it clearly appears to be, it is contrary to the laws and moral principles we have followed since the insanity defence was first recorded in the M'Naughten case.

If the purpose of the bill is to keep from rewarding wrongdoing, it should be said that the benefit is not for the act perhaps done years ago, but for the present illness and the inability to live free and support oneself. And surely, no one suspects for one moment that anyone would trade his freedom for being locked up day in day out, for weeks, months, and years for the whopping sum of less than 75 cents an hour.

While the emotional and political appeal of this bill may be great and while there is little reward for championing the unpopular cause, please remember that this nation and its leadership are measured by history by how you respond to the difficult issue and how you treat the least of our citizens.

You have the choice to do that which is easy or that which is right. On behalf of those who could not ask you themselves, I ask you to do what is right.

Thank You

Chairman JACOBS. Mr. Honberg.

STATEMENT OF RON HONBERG, LEGAL COUNSEL, NATIONAL ALLIANCE FOR THE MENTALLY ILL

Mr. HONBERG. Mr. Chairman, members of the subcommittee, I appreciate this opportunity to testify. My name is Ron Honberg. I am legal counsel for the National Alliance for the Mentally Ill. We are a national grassroots organization with 140,000 members who are primarily families of people with severe mental illnesses as well as people with those illnesses themselves.

We have heard some shocking testimony today. And I am certainly not here to excuse the actions of the individuals who committed the acts, nor am I here to trivialize the suffering experienced by their victims or their families or their loved ones. But the sad reality is that there are today many people with severe mental illnesses in our communities who are not receiving the care and treatment and support they need to function effectively in the communities, and a small subsection, and I emphasize small subsection of those people, when untreated, may engage in behaviors of a serious criminal nature.

I am here to argue against the adoption of H.R. 979. That is probably no surprise. I am doing so for three reasons. First of all, a determination of not guilty by reason of insanity is not a criminal conviction. It is a determination that a defendant by virtue of his or her mental illness was not criminally responsible for his or her actions at the time of the alleged crime.

A finding of not guilty by reason of insanity represents recognition by a judge or jury that the accused defendant requires treatment for his or her mental disorder, not punishment. Individuals found not guilty by reason insanity are remanded to the civil commitment authority of their State and civil commitment proceedings are commenced. In virtually every case, incidentally, the individual is committed to a secure forensic facility.

The point I am trying to make here is that NGRI, in a legal sense, is a form of acquittal and should be considered analogous to civil commitment, not analogous to a determination of guilt. It is really not appropriate to consider people found NGRI in the context of existing provisions in law removing persons found guilty from their SSDI benefits because NGRI does not constitute a finding of guilt.

Persons who are found NGRI have the same civil rights as do persons who are subject to civil commitment. These rights include the right to treatment and habilitation, in some States the right to vote, and also, I maintain, the right to the retention of SSDI benefits.

Secondly, SSDI as you know is a program of social insurance. Persons eligible for these benefits qualify based on the severity of their disabilities and because they, or in certain cases their family members, have paid into the Social Security system. In this context, I would maintain that SSDI is analogous to private insurance and persons found not guilty by reason of insanity do not forfeit their eligibility for private insurance benefits.

It would therefore not be just to mandate through legislation that they be removed from a public program of social insurance,

NAMI

TESTIMONY SUBMITTED BY THE

NATIONAL ALLIANCE FOR THE MENTALLY ILL

Mr. Chairman, Members of the Committee, I appreciate the opportunity to testify before you today. My name is Ron Honberg and I am Legal Counsel for the National Alliance for the Mentally Ill (NAMI), a national advocacy organization with 140,000 members who are families of persons with mental illness and those persons themselves.

The testimony which we have heard today details actions of a shocking nature which were committed by individuals who were subsequently found not guilty by reason of insanity. It is not my purpose to excuse those actions, nor am I here to trivialize the suffering experienced by their victims or their victims families and loved ones. The sad reality is that there are today many persons with severe mental illness in our communities who do not receive the treatment and supports they need to function effectively in those communities. A small subsection of those persons, when untreated, may engage in behaviors of a serious criminal nature.

It is rather my purpose to argue that H.R. 979, which would remove persons found not guilty by reason of insanity (NGRI) who commit felony's from their Social Security Disability Insurance (SSDI) benefits, should be opposed by your Subcommittee. There are three essential reasons for this position.

First, a determination of NGRI is <u>not</u> a criminal conviction. Rather, it is a determination that a defendant, by virtue of his/her mental illness, was incapable of formulating criminal intent at the time of the alleged crime. A finding of NGRI represents recognition by the judge or jury that the accused defendant requires treatment for his/her mental disorder, not punishment. Individuals found NGRI are remanded to the civil commitment authority of their State and civil commitment proceeding are commenced. In virtually every case, the individual is committed to a secure, forensic facility.

The point here is that NGRI, in a legal sense, is analogous to civil commitment, not a finding of guilt. As an aside, recent statistical evidence demonstrates that persons found NGRI are, on the average, removed from society for longer periods than if they had been convicted for the crime for which they were accused. Persons who are found NGRI have the same civil rights as do persons who are subject to civil commitment. These rights include the right to treatment and habilitation, the right to vote, and also retention of SSDI benefits. It is not appropriate to extend the provisions of the Social Security Act removing persons convicted of crimes from the SSDI roles to persons found NGRI because a finding of NGRI is a finding of non-criminal culpability.

Second, SSDI is a program of social insurance. Persons eligible for these benefits qualify based on severity of disability and because they (or in certain cases family members) have paid into the social

security system. In this context, SSDI is analogous to private insurance. Persons found NGRI do not forfeit their eligibility for private insurance. It would therefore not be just to mandate through legislation that they should be removed from a public program of social insurance which they have paid into and to which they are entitled by virtue of a severe disability which renders them unable to work.

Finally, removing persons found NGRI from the SSDI roles is contrary to principles of effective rehabilitation and community reintegration. Unlike SSI, there are no limits on the extent to which SSDI recipients may save their money. The money which an SSDI beneficiary who has been found NGRI may save during the course of his/her commitment can be used for purposes of treatment and rehabilitation after release into the community. Availability of individual resources following release may be particularly important since many of the publicly funded treatment and rehabilitation programs are underfunded and therefore have significant waiting lists. The immediate availability of treatment and supports may be critical to the successful reintegration of the individual into the community.

One final point must be made. The argument that persons found NGRI who have been accused of felonies should be removed from SSDI because they are already being publicly funded by virtue of residence in a public facility is not necessarily true. In many instances, states assume the role of representative payee for individuals found NGRI in civil facilities. Under such circumstances, the SSDI benefits may be used in part or in full to residential and treatment costs of those individuals. The argument that these individuals are "double dipping", i.e. living at public expense and receiving SSDI benefits does not apply in those instances.

Thank you for the opportunity to testify before this distinguished Committee. I stand ready to answer any questions which you may have.

a very strong point, and I for one believe it is something we ought to take into account very carefully in examining the legislation.

So we thank the panel for its contribution. It has been considerable.

[Whereupon, at 2:58 p.m., the hearing was adjourned.]

[Submissions for the record follow:]

David R. Bryant

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GENERAL PRACTICE
SOCIAL SECURITY

FAX (312) 263-3746
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July 23, 1993

Congressman Andy Jacobs
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

RE: H.R. 979

Dear Congressman Jacobs:

Rather than testify at the Hearing, I wish to comment on the proposal to amend the Social Security Act (H.R. 979) to prevent payment of benefits (retirement, survivors, or disability) to criminally insane individuals confined to public (or private) institutions by Court Order.

I agree with the proposition and suggest that the bar to benefits be extended to those who are institutionalized for any reason, not just felony convictions, at the public expense. This would include residents of Veterans Homes, County Hospital long term residents, inmates to correctional facilities who cannot make bail and awaiting trial for a felony charge, and others similarly situated on a long term (i.e., more than 90 days) basis.

Respectfully submitted,

David R. Bryant

DRB:paz
cc: Janice Mays, Chief Counsel

If the proposed legislative language, or some variation thereof, is adopted, it would resolve the issue as to whether the funds are collectible. This would confine the issue in the class actions currently before the courts to the administrative process of collection, which we feel should stand on its own merit.

STRATEGY:

Congress could be approached in two ways. First, it can be argued that the reference to exempting these funds from the claims of creditors was intended to allow residents to be able to use their benefits for current needs, not for payment of past debts. If a recipient is in a state, county, or federal facility, and the facility is meeting the person's needs, it only seems logical that their income should be used to pay the charges.

Second, recipients residing in private facilities or on their own certainly must use the benefits to pay for the services being provided. If the recipient refused payment, the owner of the facility would evict the client. State, county, or federal facilities should not be any less entitled to reimbursement.

The major players in this issue would probably include state, county, and federal institutions which provide services to persons having a mental or developmental disorder. It seems certain that all 50 states would benefit by this proposal.

EXISTING AND PROPOSED TEXT

42 U.S.C., Section 407 (a), dealing with social security payments, provides as follows:

> "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." This Section shall not apply as to charges incurred for care, support, maintenance, and medical attention provided while the beneficiary is a resident or patient in a facility operated by a governmental agency, nor as to such charges paid on behalf of the beneficiary by a governmental agency.

45 U.S.C., Section 231m (a), dealing with railroad retirement payments, provides as follows:

> "Except as provided in subsection (b) of this section and the Internal Revenue Code of 1954 [26 U.S.C.A. § 1 et seq.], notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." This Section shall not apply as to charges incurred for care, support, maintenance, and medical attention provided while the beneficiary is a resident or patient in a facility operated by a governmental agency, nor as to such charges paid on behalf of the beneficiary by a governmental agency.

38 U.S.C., Section 5301 (a), dealing with veteran payments, provides as follows:

> "Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contain as

STATEMENT

OF

DAN FULTON, PRESIDENT

NATIONAL ASSOCIATION OF DISABILITY EXAMINERS

Mr. Chairman and Members of the Sub-Committee:

My name is Dan Fulton. I am serving as president of the National Association of Disability Examiners for the current year. On behalf of our Association, I am offering the following statement regarding H.R. 979, the proposed legislation to bar Social Security benefit payments to criminally insane individuals who are confined to public institutions by court order.

We endorse your initiatives to change the law thus barring institutionalized persons found not guilty by reason of insanity from receiving disability benefits. NADE subscribes to the position of establishing a consistent, program-wide policy of applying the same restrictions to persons confined in prison or other correctional facilities and persons institutionalized secondary to a court order based on a finding of not guilty by reason of insanity, without regard to specific crimes.

This concludes my statement for the record. I appreciate the opportunity of being able to submit this statement on behalf of our Association.

NEW YORK STATE
OFFICE OF MENTAL HEALTH
44 Holland Avenue, Albany, New York 12229

RICHARD C. SURLES, Ph.D., Commissioner

Finance Group
JOHN F. SHEPARDSON, Associate Commissioner

October 1, 1993

Ms. Janice Mays
Chief Counsel and Staff Director
Committee on Ways and Means
United States House of Representatives
1102 Longworth House Office Building
Washington D.C. 20515

Dear Ms. Mays:

I would like to take this opportunity to submit the following information as part of the printed record of the September 21, 1993 hearing regarding bill #H.R. 979. As we understand it, this bill would expand current restrictions on payment of Social Security benefits to incarcerated felons to include individuals confined to public mental institutions by court order based on a verdict of not guilty by reason of insanity (hereinafter referred to as N.G.R.I.). Senator Jessie Helms has also proposed similar legislation in the Senate.

The New York State Office of Mental Health is opposed to this bill. Certainly we agree that N.G.R.I. individuals should not be allowed to spend Social Security benefits on luxuries while the State has to supply their daily needs. However, we believe the solution to this problem is to allow the states legal recourse when a Social Security beneficiary who is receiving care at the expense of the state refuses to pay for care from his/her benefits. In contrast, the approach embodied in HR 979 would penalize states, eliminating a source of revenue that helps offset the cost of psychiatric care for N.G.R.I. individuals. We would like to take this opportunity to describe the problem that the New York State Office of Mental Health faces and our proposed solution.

New York State statute, as is the case with most other states, assesses liability to N.G.R.I. patients for their cost of care. The validity of this statute has been tested and upheld in both the State and federal courts. Currently New York has approximately 385 N.G.R.I. individuals in our public psychiatric hospital system and approximately 190 of these individuals receive Social Security benefits. The appropriate payee has been determined for 163 of these individuals and charges have been assessed. Currently 136 of these accounts are being paid generating $750,000 per year in revenue. In addition, most of these individuals have Medicare coverage as a result of their receipt of Social Security disability benefits. Practically all of them would lose their Medicare B coverage because their premiums would not be paid. Approximately 140 of these individuals are currently maintained at Medicare certified facilities which generates additional annual Medicare B revenue of $700,000. Therefore, if these individuals' benefits are discontinued the State of New York could lose revenue of $1.45 million per year.

In these difficult economic times the States cannot afford to sustain this type of revenue loss while having to continue to support these individuals on a daily basis. Much has been said and written about those N.G.R.I. individuals who receive Social Security benefits but contribute nothing toward their cost of care. In New York approximately 16% of these N.G.R.I. individuals do not pay charges assessed against Social Security benefits for the cost of care which means that approximately $145,000 per year in additional potential revenue is lost. However, these N.G.R.I. individuals do not differ significantly in this respect from other Social Security beneficiaries residing in New York State public psychiatric hospitals. It is estimated that in New York we lose $3 million dollars per year in potential revenue from Social Security beneficiaries who refuse to contribute to their cost of care in our public facilities.

The New York Office of Mental Health believes that this issue is larger than the relatively small subset of N.G.R.I. Social Security beneficiaries in our public facilities who refuse to pay toward their cost of care. These individuals have the same liability as other patients in our facilities and they have the same "right" to refuse to pay. This "right" derives from Section 207 of the Social Security Act also known as the non-assignment clause. Section 207 in effect insulates Social Security benefits from the claims of creditors and in the

The Stephanie Roper Committee, Inc.

14804 Pratt Street #1, Upper Marlboro, Maryland 20772
Phone (301) 952-0063 / FAX (301) 952-2319

STATEMENT OF ROBERTA R. ROPER, DIRECTOR, ON BEHALF OF THE STEPHANIE ROPER COMMITTEE ON HR 979

The Stephanie Roper Committee is an organization which advocates for victims of crime. While based primarily in Maryland, the Stephanie Roper Committee has members nationwide.

The Stephanie Roper Committee believes that the payment of Social Security Benefits to those found criminally insane IS A TRAVESTY OF JUSTICE as those persons are benefiting from their unlawful conduct.

Most important, the Stephanie Roper Committee believes the Federal and State Governments should amend their laws to encourage the ordering and collection of restitution. As to those receiving Disability Benefits, crime victims who have criminal restitution orders or civic judgment orders should be able to attach all of those benefits while those individuals are in a mental hospital, and a percentage of those who are not in a mental facility in order to satisfy the order or judgment. (We likewise believe that other procedures that are used for their support collection such as Federal Income Tax Intercepts and direct payments of Armed Service Active or Retired pay should be able to be used to collect criminal restitution.) I am attaching as exhibits a copy of the Crime Victim Compensation Quarterly, No. 2, 1993 Restitution and Subrogation, and the Maryland Governor's Task Force on Alternative Sanctions to Incarceration Recommendation #14 on Restitution.

As a secondary priority, the State should be able to subrogate any costs they pay to house those found criminally insane. Any money still due or owing to such committed individuals should be given to the States to help other victims. Maryland has the Maryland Victim of Crime Fund to help victims. Maryland Annotated Code, Article 27, Section 764(j) and 764 (k).

We urge the Committee to act to prevent such committed individuals from receiving Federal funds. Rather than simply making said individual ineligible for Federal Benefits, we believe the better approach would be the establishment of a priority scheme to help the victims of such offenses, the State for the costs of treating said person, and to help other victims in general.

Respectfully submitted,

Roberta R. Roper
Director

Att: (2)

"One person can make a difference and every person should try . . ."

-Stephanie Roper

Technical Assistance Supplement

RESTITUTION AND SUBROGATION

Iowa's aggressive recovery efforts are boosting resources and holding offenders accountable

Kelly Brodie, Deputy Director, and Alison Sotak, Restitution/Subrogation Coordinator
Iowa Crime Victim Assistance Programs

Claims in Iowa, like most other compensation programs, soared dramatically in the last several fiscal years. In FY 1989, we received 350 claims. In FY 1992 the number had skyrocketed to 1,555. Many other programs saw a tripling or quadrupling of their claims in the same time frame, and since more claims translates into more payments, this growth has created an unprecedented fiscal crisis for numerous states. Funding has been outstripped by demand, and most programs are searching desperately for new ways to boost resources and control costs.

While we've been fortunate to maintain a relatively solid revenue base in Iowa through our funding mechanisms (primarily a portion of a surcharge on all criminal fines, including traffic offenses, and a $100 civil penalty on drunk driving convictions), we've recognized that it's critical for us to initiate whatever efforts we can to maintain adequate funds. An important area we've concentrated on in the last few years--and especially during the last year, when we've had a full-time staff specialist on board to do the work--has been recovering restitution and enforcing our subrogation rights. With remarkably little effort--merely sending out notification letters to county attorneys when our program received an application and again when a payment was made--we tripled our restitution/subrogation recoveries from only $39,000 in FY 1989 to $120,000 in FY 1992. With the addition of our restitution/subrogation specialist in July 1992, and our implementation of new strategies to offset income taxes and garnish and assign wages, we more than doubled our recoveries to $258,000 in the latest fiscal year--nearly 15% of our payouts of $1.8 million. More than 1,500 defendants are reimbursing us now. And we know we can do even better.

Some programs don't believe it's cost effective to pursue restitution/subrogation recovery efforts. They wonder whether the investment in staff time will pay off, and they worry that their federal VOCA grant will be reduced because monies recovered must be subtracted from their certified state payout. Our experience in Iowa should allay these concerns. First, our full-time specialist pays for her salary several times over through the increased amounts we recover; this truly has been a terrific investment of administrative resources. Second, while our VOCA grant is reduced slightly because of the subtraction of recovered funds from our payout, our overall income gain far outweighs this small cut. And remember, we can deduct the entire salary of a full-time restitution specialist from the amounts recovered, so only our net gain is used to reduce our certified state payout.

We're now recapturing nearly 15% of our payouts, from more than 1,500 offenders.

As an example, if we award $2,000,000 in state dollars, and make a net recovery of $200,000 in restitution/subrogation (recovered funds minus our specialist's salary), we will still have a net gain of $120,000 after our VOCA grant is reduced from $800,000 to $720,000, in comparison with a program that has not collected any restitution/subrogation income. And remember, we've also paid for our specialist's salary from the recovered funds, so that gain of $120,000 can go in full toward increasing our funds for awards.

	With Recovery Efforts	*Without Recovery Efforts*
State payout	$2,000,000	$2,000,000
Net recovery	- 200,000	-0-
Net payout	1,800,000	2,000,000
VOCA match	x 40%	x 40%
VOCA grant	720,000	800,000
Net recovery	+ 200,000	-0-
Total income	920,000	800,000

The bottom line is that it works, and that it's worth pursuing. We intend to continue in Iowa to make

criminals pay, and to relieve the burden on our own resources, through aggressive recovery efforts. We think a similar program could work for any state compensation program that adopts it. This article will describe in some detail the specifics of how we implement our strategy--and why.

Background

Compensation programs were created in large part due to the ineffectiveness of restitution enforcement efforts. Since victims were not receiving full reimbursement for their losses from the offenders, state and federal governments sought to create and support programs that would provide financial assistance.

But the goals and philosophy of restitution should not be overlooked simply because we now have compensation programs in all 50 states--nor should we disregard enforcement and collection just because a victim's losses have been paid in full or in part by the compensation program. State policy should be to hold offenders responsible for the damage of their actions whenever possible, and all elements of the criminal justice system--judges, prosecutors, corrections officials, and parole and probation officers, as well as compensation programs--should do what they can to coordinate the measure of justice afforded by restitution.

Defendants can pay--if required to do so.

Failure to order, monitor, and enforce restitution orders erodes the public's faith in the justice system, and sends a powerful negative message that the system is not serious about making offenders pay. The deterrent effect of restitution is lost. Victims are [illegible] angry and frustrated. And compensation programs get stuck with more of the tab.

We hear over and over again from corrections officials and others that offenders can't afford to pay restitution. But we've demonstrated clearly in [illegible] defendants can pay--if required to do so. Last [illegible] Department of Corrections [illegible] administrative rules [illegible] allows prison officials to [illegible] 20% of all funds deposited into an inmate's account, including cash gifts, for restitution. Last fiscal [illegible] Department collected $550,435 for victims [illegible] from incarcerated defendants.

Victims are in no better financial position [illegible] the cost of crime than offenders. If offenders don't pay, then victims do--along with state compensation programs. Reversing the system's neglect of restitution efforts not only has financial benefits for victims and compensation programs, but also advances important social and justice policy objectives.

The goal of restitution is simple and powerful: to hold the offender responsible for the monetary expenses incurred by the victim as a result of the crime, and by the state for the cost of prosecution. Restitution serves the sentencing goals of both retribution and rehabilitation. That is also reimburses our compensation programs for the money we award is only one benefit of an effective restitution initiative.

It's imperative to build support for your recovery efforts with prosecutors, judges, and corrections and probation/parole officials.

There's an offender in every case. That means that someone is liable for the victim's losses in every case, whether it be the offender, or a tavern that served the offender liquor, or the hotel where the rape occurred, or an insurance company, or some other liable third party. Our job is to recover as much money as we can from those liable, so that neither the victim or the compensation program pays if we can get those responsible to bear the burden.

Building Support

Before embarking on a collection initiative, it's imperative that compensation programs build support for their program within the criminal justice system. It's also important to make sure that legislative provisions are in place to ensure that your program can readily receive restitution.

Our office has worked very hard to establish and maintain good relations with prosecutors, the courts, and corrections and parole/probation officials. We have tried to educate all "players" in the system as to our [illegible] of view. [illegible] proactive [illegible] our interest [illegible] important part of this process is to make sure that we're doing our best to [illegible] moving out awards in as fast and efficient way as [illegible]. Simplifying [illegible] application process, reducing processing time, and increasing public awareness about our program builds our credibility, and [illegible] offers a

basis for supporting what we're doing.

Some of the important legislative changes that have helped tremendously in the overall restitution effort, as well as our own initiative, include the following:

- The compensation program is specifically listed as an eligible recipient in the restitution statute so the Court can order the defendant to reimburse our program directly. We are listed second in the order of payment, however, so the defendant must first pay the victim for their non-covered losses before reimbursing us. After all restitution obligations are paid in full, the defendant's payments are applied to court costs and attorney fees.
- The county attorney is able to attach a restitution lien to a defendant's property or other assets at the time of indictment so their assets can't be divested if convicted.
- Effective July 1, 1992, all restitution orders are entered as civil judgments upon entry, which allows the victim and/or the compensation program to execute the judgment for nonpayment of the debt. Prior to this statute going into effect, parole and probation officers were asked to obtain a confession of judgment at the time of the defendant's discharge from parole or probation, thus also giving the program the option of a civil remedy.

Restitution collection efforts can be successful only if the program has strength from statutory provisions, and if it has support from the cooperative efforts of all criminal justice participants.

Restitution: Getting It Ordered

Restitution collection can prove quite lucrative if attacked aggressively. We collected close to $143,000 in restitution from 1,522 offenders in the fiscal year ending June 30 of this year, more than doubling the $66,000 we collected in FY 92. To do this, we have to make sure first that restitution is ordered, and second, that the defendant is held accountable for making payments.

Our restitution collection efforts begin on the day the application is received, since the most important part of getting restitution ordered is communicating promptly with the prosecutor handling the case. We do this by immediately sending a letter to the prosecutor's office, informing them that the victim has filed for compensation. It is very important to establish communication with the prosecutor before the offender is sentenced, so the restitution will be included in the original sentencing order. Early notification that a compensation application has been filed if a case goes to trial (or the defendant pleads guilty) before the claim is approved. The prosecutor will be aware that payments may be made later on behalf of the victim, and can leave the sentencing order open so that restitution can be ordered at a subsequent date.

When the compensation claim is approved, we immediately call the clerk of court to find out the case number and a pending trial date. We then send a letter to the prosecutor's office telling them the amount and type of compensation paid to the victim. We accompany this with a statement of pecuniary damages, which we ask the prosecutor to file with the court. This makes the job of the prosecutor easier, and gives our program a better chance of having restitution ordered. If there is no defendant at the time of claim approval, we contact the county attorney's office regardless, and then call the police department for an update six months later.

Our collection efforts begin on the day the victim's application is received, when we send a letter immediately to the prosecutor.

If all goes well, the prosecutor will ask that restitution be ordered at the time of sentencing, and the judge will order it. The process doesn't always go smoothly, however. Sometimes prosecutors and judges don't do their jobs. And victims have two years to file in Iowa, so there are times when the criminal trial is over before the victim applies. In these cases, where a defendant already has been sentenced and no restitution has been ordered, we seek to protect our rights by requesting the prosecutor to amend the sentencing order. Since many prosecutors are reluctant to take the time to do this, we found that we have to provide the prosecutor with all the necessary documents, including a statement of pecuniary damages, a motion to amend the sentencing order, and a supplemental sentencing order for restitution, so that all the prosecutor has to do is sign them and present them to the judge.

Restitution: Collecting It

While restitution is ordered on a defendant has to be held accountable for making payments. Getting defendants to pay can be more difficult than getting restitution ordered. Key to successful collection is making sure that you have accurate, up-to-date information on each defendant you're going after, and that you communicate effectively with defendants and with officials

in corrections and probation/parole.

We always request a copy of the sentencing order from the clerk of court so that we have accurate information. We then locate the defendant through the Department of Corrections data base, to which our program has been given access. Through a modem in our office, we can almost effortlessly find out what institution houses the defendant, and if a defendant is on probation or parole, the data base provides the name of the supervising officer and the defendant's most recent address.

Incarcerated defendants are a reliable source of income as restitution can be deducted automatically from their account and forwarded to the compensation program. Other states may have mechanisms to deduct portions of inmate wages.

If a defendant is in prison, we contact the prison's financial office and make them aware that restitution has been ordered on the program's behalf. We send a form for the prison's records administrator to fill out, asking whether the compensation program is listed on the defendant's restitution plan. If we're not listed, we send a supplemental order for the county attorney's office to file so we can begin receiving restitution.

If the defendant is on parole or probation, we contact the supervising officer to alert them that restitution has been ordered, and to request any plan of payment set up for the defendant. While we have found probation and parole officers to be very cooperative, they generally are not willing to keep a defendant on probation for not paying restitution.

Incarcerated defendants are a reliable source of income, since deductions can be made from their accounts automatically.

We also will communicate by mail directly with any defendant that's not in prison. We send an initial letter to let them know that our program is aware that they were ordered to pay, and that we are serious about monitoring and collection. We find this to be very effective and some of the defendants have come into the office and paid in full upon receiving the letter.

When the defendant does not make a payment in three to six months, a delinquency letter is sent to the [illegible] with a copy to the probation officer and the prosecuting attorney. Defendants are advised that failure to meet restitution obligations could result in [illegible] and [illegible]

wage garnishment.

An important note. The Fair Debt Collection Act must be consulted prior to initiating contact with a defendant. This law details the legal guidelines regarding communication with a defendant concerning their debt and repayment obligation.

Income Tax Offset

The Iowa compensation program negotiated an agreement with the Department of Revenue and Finance to offset or seize income tax refunds when a defendant is delinquent in making restitution payments. Most states have an existing law that allows the seizure of refunds for delinquent income taxes, child support, and unpaid debts. (This year we even seized a lottery award from a lucky(?) offender!)

We send letters directly to defendants not in prison, to let them know we're aware of their obligation to pay, and that we're serious about getting our money.

[illegible] defendant's social security number is used to [illegible] the defendant with the refund, and thus apply [illegible] offset. The compensation program must notify the [illegible] dant that a state income tax refund will be seized [illegible] applied to the delinquent restitution. The process [illegible] takes, but it can take a year or longer for the program [illegible] receive the offset on a delinquent defendant.

Wage Garnishment

Another approach for collecting delinquent ac[illegible] is through wage garnishment. If the program [illegible] a judgment against the defendant the program may [illegible] able to place a garnishment or lien on a defendant's [illegible] wages until the restitution is paid in full. In Iowa we [illegible] enlisted the Child Support Recovery Unit of the [illegible] Attorney General's office to obtain guidelines about [illegible] garnishment. We modified the standard Iowa Bar [illegible] Association garnishment forms and letters to fit our [illegible] and to merge [illegible] our data base.

[illegible] assist in identifying the defendant's place of [illegible] ployment we sought access to the Department of [illegible] Security's [illegible] Employment Services [illegible] has a comprehensive data base that is updated [illegible] as all employers are required to report employee [illegible] earnings. [illegible] work's com

pensation insurance payments

There are specific guidelines set out in the Iowa code for garnishments, and we urge other programs to research their state's laws thoroughly before beginning

Wage Assignment

Another alternative to garnishment is wage assignment. A wage assignment is a written agreement between the defendant, the compensation program, and the employer. The defendant agrees to have a certain dollar amount taken out of his/her paycheck each pay period. The employer then forwards the payments to the compensation program

After the defendant has had his or her wages garnished, the defendant may be willing to agree to a wage assignment. Wage assignment is more convenient for the defendant because less money may be taken from their check per pay period, according to the agreement reached. It is very beneficial for the compensation program because there is no cap on the amount that can be withheld each year, nor any filing or service fees

Civil settlements can be quite large, so recovery of the program's entire award is possible.

Subrogation

Subrogation is a monetary settlement that a victim recovers in a civil suit from a third party. It could be money recovered from the offender, or a tavern liable in a "dramshop" case (for serving liquor to the offender), or an insurance company or another liable entity. Since settlements in such cases can be quite large, a program may easily be able to cover the entire amount of its payments to the victim. We have also found that a large number of victims do retain civil attorneys, so programs should not overlook this potentially lucrative opportunity to recover awards

Our program tries to find out about attorney representation as early as possible by requesting that information on the victim's application for compensation. Once we approve a claim, we send a letter to the victim's attorney, notifying them of the payment to the victim and emphasizing that we expect to be reimbursed if the victim's legal action is successful. We include a breakdown of the expenses paid for. In attorney has full documentation of what losses we've covered

Once notified, the attorney will usually contact us when a settlement is going to be negotiated. If the attorney does not respond within six months after the claim is approved, however, we send a letter to the attorney requesting a status update on the pending suit and reminding the attorney of the program's interests. Most attorneys will understand their legal obligation to cooperate with a compensation program that is authorized by law to subrogate, so there should be no problem in compliance.

In Iowa we take the position that we should be reimbursed 100%, minus a pro rata share of the expenses incurred in obtaining the settlement. Still, there are times that we will negotiate with the attorney. The following criteria are looked at when negotiating a settlement:

- Total amount of settlement
- Extent of victim's non-covered losses
- Victim's ongoing medical needs and hardships
- Whether other parties have a subrogation interest

While subrogation can be very lucrative, settlements between victims and liable third parties may take a long time to be reached. We've recovered $143,000 through subrogation this past year, of which $114,000 is clear gain after allowing victims' attorneys fees

A Final Comment

We should note that a crucial element in our recovery efforts is an excellent computer system that enables us to merge data base information and send letters easily, and to run monthly status reports so we can keep up to date on what's happening in each case.

To repeat, we believe that our restitution/subrogation recovery initiative helps us meet our responsibilities both to hold offenders accountable and to maximize our resources for victims. When we began our efforts, we were pleased by how much we could accomplish with relatively little effort. And as we become more adept and aggressive at seeking reimbursement, we are even more convinced that we can regain an ever greater share of our awards by making those pay who have done harm to innocent victims.

We'd be happy to talk further with anyone who wishes to discuss restitution and subrogation recovery, or who wants copies of our various forms and letters, including our supplementary orders and garnishment [illegible] Brodie or Alison Sotak at (515) 281-5044 or write us at the Department of Justice, Old Historical Building, Des Moines, IA 50319.

BONNIE J. CAMPBELL
ATTORNEY GENERAL

OLD HISTORICAL BUILDING
DES MOINES, IOWA 50319
PHONE: (515)281-5044
(800)373-5044

Department of Justice

CRIME VICTIM ASSISTANCE PROGRAM

September 28, 1992

DEFFULLNAME
ADDRESS
CITY,STATE,ZIP

RE: Claim No.: *Claim No.*
Victim: *VICTIM*
Defendant SS# *SS#*

Dear :

The Crime Victim Compensation Program has been informed by the *COUNTY* Clerk of Court that you have been ordered to pay restitution in the amount of $(amt) to the Crime Victim Compensation Program. The plan of payment states that you are required to pay $(amt) beginning (date) and then monthly until the balance is paid.

This restitution is monitored each month, therefore it is important to keep up with your monthly payments until the balance is paid in full.

Thank you for your cooperation in this matter. The Crime Victim Compensation Program will be expecting your restitution payment soon.

Sincerely,

Alison E. Sotak
Restitution Coordinator

This is an example of our Defendant letter. This is sent as soon as the defendant is ordered to pay restitution to our program. Sometimes a copy of the letter is forwarded to probation and parole officers for their records.

The Honorable Joseph A. Ciotola
Chairman
Administrative Judge, District Court,
Baltimore City, Retired

Nancy J. Nowak
Staff Director
Governor's Office of Justice
Administration

The Honorable Howard S. Chasanow
Maryland Court of Appeals

Benjamin R. Civiletti, Esquire
Venable, Baetjer & Howard

David S. Cordish, Esquire
The Cordish Company

Hal Donofrio
Richardson, Myers & Donofrio

Belle Vee B. Gentry
Ebony

Anthony T. Hawkins
Rouse Corporation

Alan P. Hoblitzell, Jr.
Ryland Group, Inc.

Peter P. Lejins, Ph.D.
University of Maryland

Kent W. Mason
Montgomery County Pre-Release
Center

Ellen McDaniel, M.D.
Physician

George Phelps, Jr.
Phelps Protection System

Secretary Bishop L. Robinson
Department of Public Safety and
Correctional Services

George L. Russell, Jr., Esquire
Piper & Marbury

Byron Moore Sedgwick
Newspaper Columnist

Mark K. Shriver
CHOICE

The Honorable Stuart O. Simms
State's Attorney, Baltimore City

George Everett Surgeon
Anne Arundel Careers Center

GOVERNOR'S TASK FORCE

ON

ALTERNATIVE SANCTIONS

TO INCARCERATION

FINAL REPORT

William Donald Schaefer, *Governor*

March, 1992

LEGISLATION:

Introduction of a new Maryland Community Corrections Act in January, 1993. (Appendix E)

FISCAL IMPACT:

Positive results have also been achieved in Oregon and Virginia. In 1981, Oregon estimated $16 million in savings by operating community corrections programs rather than incarcerating the targeted offender population. In 1982, Virginia estimated an annualized cost avoidance of $865,000.

It is anticipated that $13 million in State and/or federal funding will be required to initiate a Maryland Comprehensive Alternatives Act in FY94. Nevertheless, the longer term cost savings should supersede the $13 million many times over.

AGENCIES RESPONSIBLE FOR IMPLEMENTATION:

The Board; GOJA; the Department of Public Safety and Correctional Services; local corrections departments.

RECOMMENDATION #14. ***The application of financial sanctions by the Maryland Judiciary should be examined and expanded.***

The Board, in concert with the Administrative Office of the Courts and Department of Public Safety and Correctional Services through the Division of Parole and Probation, shall continue to explore the expanded use and enforcement of financial sanctions. The Judiciary should expand the current practices of ordering restitution where statutorily permitted and the Division of Parole and Probation should develop strategies to improve the rate of satisfactory compliance with restitution orders. Maryland should develop policy encouraging a more extensive use of restitution and fines and the establishment of the day fine program. The Judiciary should assist in the development of the "day fine" concept.

RATIONALE:

The use of monetary fines is a philosophy integral to the criminal justice system. In FY90, according to the National Institute of Justice, over $1 billion was collected in fines nationally. As one of the few sanctions which emanates directly from the Bench, the concept of monetary retribution has a number of positive aspects:

- Adjustments to a level appropriate to the individual circumstances of the offender and to the seriousness of the crime;
- Community based, consequently, does not destroy the essential economic and social ties of the offender;
- Relatively inexpensive to administer, relying on existing governmental agencies and procedures already in place;
- Financially self-sustaining and, unlike incarceration, maybe revenue producing;
- Possibly effective punishment and deterrent for offenders who have committed crimes of varying levels of severity;
- Direct correlation between sanction and property-related crime and crimes driven by economic gain;
- Easily combined with other sanctions.

In 1973, the Task Force on Corrections of the National Advisory Commission on Criminal Justice Standards and Goals found that "properly employed, the fine is less drastic, far less costly to the public, and perhaps more effective than imprisonment" for the non-violent offender population.

Until very recently, this recommendation has gone largely unheeded due to lack of agreement regarding the proper administration of fines. However, with jail and prison

populations and probation caseloads steadily rising, fines are gaining renewed attention.

In 1989, of the total number (52,785) of new parole and probation cases in Maryland, only 11,329 involved orders for monetary payments (fines, court costs, and restitution). Of these 11,329, only 6,125 cases included orders for restitution to victims. Restitution was ordered by the courts in only eleven percent (11%) of the total cases. The actual amount of restitution ultimately collected by the Division of Parole and Probation for 1989 was a relatively small percent of the total ordered. Thus current restitution orders too frequently neither impact the offender or benefit the victim. Clearly, since only twenty-one percent (21%) of the total number of Maryland parole and probation cases in 1989 were ordered to pay fines, the use of the fine as a punitive sanction must be expanded.

According to a recent national study of judicial attitudes toward fines, judges of both limited and general jurisdictions are much more favorably inclined toward the fine as a punishment in theory than in practice. This philosophy, however, must change. Whether one thinks of punishment in retributive or deterrent terms, the fine can be used as punishment either ordered as a sole sanction or in addition to another alternative. According to Morris and Tonry (1990), judges must be provided with information regarding the convicted offender's financial circumstance in terms of net worth, income, and obligations to dependents.

The success of increased use of fiscal sanctions is contingent upon effective enforcement. An effective system of collecting the fines must be established for tracing late payments promptly and pursuing violators immediately, and returning offenders to the courts in those cases of delinquency.

The day fine concept, a Scandinavian innovation used most frequently in Western Europe, is only now beginning to receive serious attention as a correctional sanction in the United States. Essentially, the day fine is designed to enable a sentencing judge to impose a punishment commensurate with the seriousness of the offense through evaluation of the offender's prior record and economic circumstances.

With respect to day fines, the amount of the fine is set in two (2) stages. First, the number of "units of punishment" is established, taking into account the seriousness of the

offense and information regarding the offender's prior record. Second, the monetary value of each unit of punishment is set dependent on the financial condition of the offender. For example, although two (2) offenders may be sentenced to the same number of units for the offense, the more affluent offender would be sentenced to a larger monetary amount per punishment unit than the less affluent offender. In the event of a default in peyment of the fine, the resulting sanction for each would be the same.

The day fine concept also addresses criticisms of "traditional" monetary fines as a lenient punishment because of the failure of the criminal justice system to emphasize collection and because of economic inequalities. The day fine system, however, lends equity to the issue. The number of day fine units reflects the offense, while the dollar amount reflects the financial condition of the offender.

Fines, quite simply, are revenue producing; actual funds are brought into the justice system, in contrast with the cost of incarceration. In fact, those paying fines are literally "paying a debt to society," rather than contributing to existing burdens on State and local resources. Fines are easily coupled with other penalties to meet the objective of justice applicable to each specific offender.

POPULATION TARGETED:

The expanded use of fines would include more serious probationers as well as parolees found guilty of offenses which do not include the commission of a crime of violence as defined under Article 27, Section 643B of the Annotated Code of Maryland.

POTENTIAL IMPACT:

The potential short term impact of expanded use of fines and the development of the day fine concept would be the realization of a greater number of bench dispositions utilizing this sanction. Mechanisms need to be in place to ensure adequate enforcement and proper collection of the fines. It is also a strong recommendation that, in the event of a default, the offender serve the remaining time in a day reporting center, alleviating jail or prison bed-space. Greater use of fines, with aggressive enforcement, would add considerable

revenues to State and local government.

POLICY:

The Judiciary should take a lead role for the promulgation and implementation of policies with respect to financial sanctions with the Administrative Office of the Courts assuming primary responsibility for establishment, enforcement, processing, record keeping, statistical reporting, data collection, and evaluation. Strong linkages will be necessary with correctional agencies, specially in the matters of default and offender accountability. The Division of Parole and Probation, in concert with the Judiciary, should develop firm procedures and strategies to increase the rate of payment when restitution is ordered.

LEGISLATION:

Statutory ceilings for fines must be reviewed and appropriately be lifted to allow imposition of larger fines. Statutory restrictions on the use of fines as a sole sanction for specific offenses should be removed. Legislation, particularly involving the day fine program, should address "dollars-to-days" conversion rates to ensure that offenders having similar prior records serve essentially similar jail terms in the event of default. Legislation may be necessary to ensure auditing by the appropriate fiscal authority, i.e. the Office of the Comptroller.

FISCAL IMPACT:

During FY91, the total amount of fines collected by the District Court in criminal cases was approximately $2.2 million. Consideration should be given to the dedication of a function within the Administrative Office of the Courts to manage the collection of restitution and fines. Staffing would be contingent on the expected use of the sanctions, volume of offenders, tracking needs, and enforcement methodology.

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AGENCIES RESPONSIBLE FOR IMPLEMENTATION:

The Board; Administrative Office of the Courts; Department of Public Safety and Correctional Services: Division of Parole and Probation.

RECOMMENDATION #15. ***Maryland must develop a comprehensive statewide plan for the administration of juvenile justice to address the immediate and long range issues confronting the system.***

The deliberations relative to alternative sanctions and system wide planning and coordination must be expanded to include the juvenile justice system.

RATIONALE:

A comprehensive analysis of juvenile justice system in Maryland should be conducted. The most recent report of the Russell Committee of the Bar Association of Baltimore City (January, 1992) addressed the critical problems confronting Maryland's juvenile justice system in the State's highest crime area. Baltimore City, in fact, ranks sixth in violent crime among urban centers of comparable size.

Nevertheless, the status of the juvenile justice system in Baltimore City reflects the problems, activities, and lack of resources which on a smaller scale are reflected in most of Maryland's twenty-four (24) geopolitical subdivisions.

Criminality clearly does not emerge upon an individual's passage into adulthood. Well substantiated data confirms that those persons adjudicated as adults for the first time have engaged in prolific juvenile delinquency. In fact, those behaviors are well-entrenched; the patterns and responsive actions are well developed. Absent sufficient resources to provide a "holistic" approach to address the voluminous needs of these young offenders, sufficient positive intervention will not occur. Simply, delinquents will graduate into the school of serious, chronic adult criminals, continuing to compound the overcrowding in State and local correctional facilities.

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